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NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a multiemployer employee benefit fund maintained for Union workers can force a contributing employer to disclose confidential records concerning employees the Union has determined are not performing Union work in contravention of the Trust Agreement creating the Fund and in the absence of reasonable cause to believe that a particular employee should be a Fund beneficiary.

LIST OF RESPONDENTS

Respondents, collectively styled Transport are: Central Transport, Inc., Central Cartage Co., Quad State Leasing, Inc., Cadillac Leasing, Inc., Dunes Leasing, Central Recapping, Inc., Michiana Trucking, Inc., Company 17, Danville Illinois Leasing, Michigan Express, Mohawk Cartage, Mohawk Motor, Inc., Flint Cartage, Bancroft Freight Lines, McKinlay Transport, Ltd. and Genessee Cartage.

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RESPONDENTS' BRIEF ON THE MERITS

RESPONDENTS' STATEMENT OF THE CASE

A. *The Contractual Relationships*. Transport is a common carrier of goods for hire in interstate and intrastate commerce. Transport and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its various locals ("Union") are signatories to the National Master Freight Agreement ("NMFA") and/or supplemental, individual agreements. The NMFA and its local area supplements are hereinafter collectively referred to as the "Collective Bargaining Agreement".

The Collective Bargaining Agreement creates pension and health and welfare plans for the benefit of individual Union members. The Collective Bargaining Agreement also establishes Trust Agreements which create the Funds. The Funds are entities totally separate from the labor organizations and the participating employers and are solely creatures of the Collective Bargaining Agreement.

Transport became obligated to, did make, and continues to make contributions to the Funds for the benefit of Transport employees who are *covered by the Collective Bargaining Agreement* and, therefore, who are eligible for benefits from the Funds. The Funds are charged with the fiduciary duty to receive and manage employer contributions for the benefit of Funds beneficiaries. However, the Funds have had many of their money management duties assigned to professional managers through a consent judgment with the Department of Labor, which settled allegations of gross mismanagement and assured that Funds assets would not be managed by the Funds' trustees.[1]

Each entity involved has a separate and distinct job:

1. *The Employer:* It is the job of the employer, Transport, to pay compensation to its employees. For collective bargaining unit employees, the employer pays cash wages to the employee and makes contributions to fringe benefit plan trustees for investment and management.

2. *The Union:* It is the job of the Union to make sure that every employee performing collective bargaining unit work becomes a Union member and receives all benefits of such membership — cash wages and fringe benefits. At all relevant times, anyone performing bargaining unit work must become a Union member within 30 days.

3. *The Funds:* It is the job of the Funds to receive the contributions made by the employer on behalf of the workers identified by the Union and employer as performing bargaining unit work and to properly invest and manage those monies to purchase the health and medical coverage and fund the retirement benefits for the sole and exclusive benefit of the Funds' participants.

Transport's operations are conducted by both union and non-union employees. Approximately 60% percent of

[1] The Consent Decree was issued on September 21, 1983 in *Donovan v. Fitzsimmons*, Civil No. 78 C 342 (N.D. Ill., filed 1981).

Transport's employees *are not covered by the Collective Bargaining Agreement* (an uncontroverted fact which was part of the stipulated District Court record). (See Sigler Affidavit, App. P.C. "H", pp. A-89-91).[2] As to those employees, Transport is not required to make contributions to the Funds.

All of Transport's employees who meet the ERISA definition of "participant" are entitled to participate in an employee benefit plan. On behalf of those employees covered by a collective bargaining agreement, Transport contributes to the Funds or to one of other Taft-Hartley plans. For those employees *not* covered by a collective bargaining agreement, Transport contributes to its own ERISA qualified defined benefit pension plan (the "Company Plan") which has been maintained since 1965. The result of any determination that a particular employee is performing Collective Bargaining Agreement work is to shift that employee from coverage under the Company Plan or another Taft-Hartley Plan to that of the Funds. The result to the employee, in that event, could be the forfeiture of non-vested Company Plan benefits or loss of participation in the fringe benefit plans maintained for members of a different union or different union local.

The Union and Transport determine which of Transport's employees are performing work under the Collective Bargaining Agreement and therefore are entitled to benefit contributions. The Funds are attempting to usurp this Union-employer function. The right of any worker to receive benefits administered by the Funds is determined by whether he is covered by the Collective Bargaining Agreement. Whether an employee must join the Union to be part of the collective bargaining unit is a matter of contract and state law.

The Union has always vigorously and effectively insured that all employees performing collective bargaining unit work receive all employee benefits to which they are entitled, including contributions to the Funds. The Collective

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[2] References to the Appendix to Petition for Certiorari will be indicated by the abbreviation "App. P.C." and the appropriate subsections ("A"-"J") followed by the page number.

Bargaining Agreement specifically provides procedures to safeguard proper designation of collective bargaining unit members through union check-off lists.[3] The Collective Bargaining Agreement provides a dispute resolution mechanism to which the employer, the Union, the employees, and/or the Funds have access to determine the inclusion of an employee or group of employees in the bargaining unit and the requirement to make contributions.[4] In addition, the parties may file a unit clarification petition with the National Labor Relations Board pursuant to Section 9 of the Labor Management Relations Act ("LMRA").[5]

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[3] See Article 3, Section 3 of the Collective Bargaining Agreement quoted at p. 30 herein. Articles 61 and 62. The Collective Bargaining Agreement provides:

> Disputes or questions of interpretation concerning the requirement to make contributions on behalf of particular employees or classifications of employees shall be submitted directly to the Conference Joint Area Committee *by either* the Employer, the Local Union *or the Trustees*. In the event of such referral, *the Employer shall not be deemed to be delinquent, while the matter is being considered*, but if the Conference Joint Area Committee, by majority vote, determines that contributions are required, the Employer shall pay to the Trust Fund the amounts due together with any other charges uniformly applicable to past due contributions. The Conference Joint Area Committee may also determine whether the Employer's claim was bona fide. (emphasis added).
>
> (App. "C", p. 24a).

[4] The 1979-82 edition of the NMFA to which the Petitioners in *Schneider Moving & Storage Co.* v. *Robbins*, ___ U.S. ___, 104 S. Ct. 1844 (1984) were signatories did not provide the Funds with such access although Sections 61 and 62 of the 1982-85 edition of the NMFA which was in effect when the Court heard *Schneider* expressly gave these Funds access to the grievance procedure. The amendments to the NMFA were only mentioned in footnote 9 of the Respondents' Brief on the Merits in that case.

[5] 29 U.S.C. § 159. Sections 102.60 and 102.61 of the National Labor Relations Board ("NLRB") Rules and Regulations Series 8, as amended, 29 C.F.R. §§ 102.60 and 102.61, provide specific procedures for the resolution of this type of dispute. This Court and the federal courts have consistently deferred disputes over bargaining unit composition to the particular expertise of the NLRB. *South Prairie Contracting Co.* v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947). Arrangements between private parties or any arbitration decision relative to the inclusion of employees into a bargaining unit — that is, the composition of any such unit, — which is contrary to the NLRB's policies in this area, would be unlawful and unenforceable. *Houston Division of Kroger Co.*, 219 N.L.R.B. 388 (1975).

B. *The "Employees"*. "Employee" is contractually defined by Article I "Definition of Terms" Sec. 3(a) of the particular Trust Agreements to which Transport is a party as

> A person who is employed under the terms and conditions of a collective bargaining agreement entered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer;

The definitions of "employee" under the Funds' Pension Plan and its Summary Plan Description and under the Funds' Health and Welfare Plan and its Summary Plan Description are similar (collectively "Plan Documents"). (App. "A", p. 1a).

The Trust Agreements require employers such as Transport to furnish to the Funds such information regarding "employees" as is *reasonably required* in the administration of the Funds. The Union is likewise contractually obligated to provide the Funds with information concerning "employees" *covered by the applicable Collective Bargaining Agreement*. Neither the Collective Bargaining Agreement nor the Funds' Trust Agreements in any way require employers to furnish the Funds with employment records of *all* persons employed. Those documents *do not* authorize the Funds to audit employers' records other than those of covered employees. Furthermore, the Funds are specifically restricted to request only records which are reasonable and relevant.[6]

C. *The Audit*. On December 5, 1979, the Funds notified Transport by mail that an inspection of Transport's employment records of "*all collective bargaining unit employees*" would be made on-site at Transport's premises beginning during the week of January 14, 1980. (App. M.B.

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[6] Petitioners' Brief on the Merits, pp. 30-31. Petitioners concede that an employer can obtain injunctive relief or damages from the trustees for unreasonable audits. Reference to Petitioners' Brief on the Merits will be indicated by the abbreviation "M.B." and the appropriate page number.

"B", p. A-11).[7] A copy of that letter was sent to the appropriate Teamsters Union locals. On or about February 4, 1980 through March 28, 1980, the Funds' auditors conducted their audit of Transport's employment records. During those two months, Transport provided appropriate records of its employees who were *covered* by the applicable Collective Bargaining Agreement but refused to supply records for its employees who were not covered by the Collective Bargaining Agreement.

D. *The District Court Action.* On May 14, 1980, the Funds instituted this action seeking, among other things, a preliminary injunction requiring Transport to provide the Funds with confidential information of *all* of its employees — both those covered by the Collective Bargaining Agreement and those not covered by the Collective Bargaining Agreement. Counsel for the parties negotiated to resolve the parties' differences and conclude the audit. The Funds continued to seek disclosure of information as to all of Transport's employees without a prior determination by Transport and the Union whether those employees are actually covered by the Collective Bargaining Agreement and therefore possible (eligible) Fund members.

The Funds have claimed the following are pertinent records:

> Payroll ledgers, payroll journals, individual earnings cards, time cards, payroll check registers, cancelled payroll checks and cancelled checks used for payment of income reported on IRS 1099 forms, voucher copies of payroll checks, drivers' daily log and trip sheets, payroll manifests, delivery manifests, trip manifests, terminal drafts, cash disbursements journal, freight bills, revenue bills, billing invoices, fuel and mileage reports, drivers' settlement statements, seniority lists, dues check off lists, IRS Forms 941 and 941C, IRS Forms W-2, W-3 and W-4, IRS Forms 1099, employer's monthly and quarterly state unemployment compensation tax and

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[7] Reference to the Appendix to Petitioners' Brief on the Merits will be indicated by the abbreviation "App. M.B." and the appropriate subsections ("A"-"B") followed by the page number.

wage reports, annual reports to the Interstate Commerce Commission, Department of Labor statistical log and summary of occupational injuries and illness, personnel files, attendance records, accounting records for distribution of payroll costs, payroll account reconciliations, workman's compensation records, notices of employee separation, monthly reports to any employee benefit plan, computer files including magnetic data base and printed reports containing above information, and corporate tax returns.

(App. "B", p. 16a).

On August 25, 1980, Transport filed its Motion to Dismiss Complaint for Failure to State a Claim upon which Relief can be Granted pursuant to 12(b)(6) of the Federal Rules of Civil Procedure. (Docket Entry No. 5). Transport contended that the Funds have neither a statutory nor a contractual right to audit the voluminous data demanded. The Funds, in response, brought a motion cast in the alternative as one for partial summary judgment and/or preliminary injunction. (Docket Entry No. 8). The parties agreed that the relevant facts were not in dispute. Treating the parties' motions as cross motions for summary judgment, the District Court granted the Funds' Motion on October 19, 1981, *thereby allowing the Funds complete access to all of the records of all of Transport's employees.*

No determination of delinquency in contributions has been made. Although the Funds assert that their audit uncovered delinquencies, Transport asserts that it has made all contributions in full.

E. *The Sixth Circuit Court of Appeals Decision.* Recognizing that in the absence of reasonable cause the audit function could be used by the Funds to harass employers, the Sixth Circuit correctly decided that the Funds had not alleged or presented sufficient evidence to justify an audit of all employee records and in an unanimous opinion written by Judge Cornelia Kennedy reversed the trial court decision. The Sixth Circuit correctly held, *inter alia,* that (i) no contractual or statutory right to inspect records of non-covered employees exists, (ii) analogies to collective bar-

gaining and NLRB disclosure rules cases are inapposite, (iii) the Funds are protected from liability if they do not review such records, (iv) the employees have adequate means through individual actions, the Union and the Secretary of Labor to prove they should be covered by the Collective Bargaining Agreement, (v) a prudent man would not expend Funds' money to launch an audit of the records of all of Transport's employees under these facts, and (vi) the decision to commence such an investigation would be arbitrary and capricious and the expenditure of money for such an investigation unreasonable. The Court did, however, grant the Funds the right to investigate the records of those four employees not on the Union seniority list for which the Funds had "reasonable cause" to believe were covered employees. *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983).

The Funds have petitioned this Court to allow the Funds to demand and investigate confidential records of employees who have not collectively bargained for such disclosure without reasonable cause to believe that those employees are covered by the Collective Bargaining Agreement.[8]

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[8] The Statement of the Case presented by Petitioner is impermissively argumentative and replete with facts not in evidence, assertions not made below and misleading characterizations of Congress' intent and the Court of Appeals' reasoning. Length limitations prevent a complete list of improper claims. The following is a representative list: Payment record of a "significant number of employers", importance of data verification in generally accepted auditing standards, (M.B., p. 3); Congressional delegation of power to trustees (M.B., p. 5); funds as functional equivalents of the Tax Commissioner; Sigler's Affidavit was "without any substantiation" (M.B., p. 7); Transport only gave records the Funds already had; auditors determined delinquencies (M.B., p. 8); *over-payment* for four employees illustrated how employees could be purposely *excluded* (M.B., o, 8); "random general audits" are the "single most reliable and effective means of uncovering delinquent contributions (M.B., pp. 11-23); employer determines employees covered by the collective bargaining agreement (M.B. p. 12); "self reporting" is required due to the Funds' size, Funds cannot physica.ly monitor reporting, all discussion of under-reporting, non-reporting and calculation example (M.B., p. 13); audits are designed to avoid privacy intrusion, review of certain forms is minimally required, auditor's objective is to assure complete

(Footnote 8 continued on page 9)

SUMMARY OF ARGUMENT

I. THE COLLECTIVE BARGAINING AGREEMENT, TRUST AGREEMENTS AND ALL PLAN DOCUMENTS RESTRICT INSPECTION RIGHTS TO EMPLOYEES COVERED BY THE COLLECTIVE BARGAINING AGREEMENT.

Article III, Section 5 of the Trust Agreements limits the records that the Funds' trustees may inspect, to those of "employees" as defined in the Trust Agreement. (App. P.C. "F" p. A-46). *All* documents, including the Plan Documents unilaterally drafted by the Funds' trustees, define participant as an employee covered by the Collective Bargaining Agreement. (App. "A", p. 1a).

ERISA's definition of employee is all encompassing. It includes "any individual employed by an employer." 29 U.S.C. § 1002(6). The Trust Agreements' definition is narrower because the Funds' benefits were not meant to be given to everyone — only to bargaining unit employees identified as such by the Union and employer. That is what the Union and Transport agreed in collective bargaining. The ERISA definition is broader, because it is used to assure that no employee of an employer can be discriminatorily denied *a* welfare benefit *if* the employer provides benefits to his employees. At the employer level, the ERISA definition of employee includes (1) employees of Transport who are covered by the Collective Bargaining Agreement and are therefore participants in the Funds, (2) employees of Transport who are covered by a different collective bargaining agreement and are therefore participants in a Taft-Hartley plan other than these Funds and (3) employees of Transport who may qualify for participation in the Company Plan — a single employer sponsored defined benefit plan for non-union employees. The Trust Agreement definition of employee is narrower than the ERISA defini-

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(Footnote 8 continued from page 8)
employee population, procedures auditor follows, permitting employer to delete confidential matters (M.B., p. 14); and "significance" of certain tax forms, discussion of owner-operators, auditor spot check procedures, limitation of audit to essential records, confidentiality safeguards from *another* case (M.B., p. 15).

tion because it describes only that portion of Transport's employees identified under number (1) above.

Congress did not intend to abrogate valid collective bargaining agreements. Congress did not say that every employee of an employer must be a participant in every benefit plan contributed to by the employer. Congress merely said that an employer cannot discriminate against an employee. The issue in this case may be disposed of by reference to the Collective Bargaining Agreement, Trust Agreements and Plan Documents.

II. ERISA DOES NOT CREATE A POWER IN THE FUNDS TO CONDUCT OVERREACHING AUDITS.

The Funds admit that the language of ERISA does not grant them the power to investigate records of non-participants. (M.C., pp. 19; 24). The Funds therefore resort to argue that such a power can be implied from their fiduciary duties under 29 U.S.C. § 1104(a) and their obligations to administer the Plans.

A. The Fiduciary Duty Rules of ERISA Neither Require Nor Authorize Unrestricted Audits of Employer Records.

ERISA demands that trustees act solely in the interests of plan "participants and beneficiaries". 29 U.S.C. § 1104(a)(1). Participants under ERISA are employees who are eligible to receive a benefit from the benefit plan. 29 U.S.C. § 1002(7). The Funds' trustees owe no fiduciary duty to those employees who do not meet the definition of "employee" in Article I, Section 3 of the Trust Agreements since they are not participants for purposes of ERISA.

The Funds' trustees' fiduciary duty owed to participants must be exercised within the prudent man standard. The prudent man standard does not sanction fishing expeditions to attempt to expand the class of participants in the Funds.

B. Congress Did Not Intend to Create Quasi-Federal Agencies of Private Parties.

The Funds equate themselves with the Internal Revenue Service and the Department of Labor because those agen-

cies enforce federal statutes and the Funds can sue employers for delinquent contributions under ERISA. The Funds request that this Court declare them to be "federal fiduciaries" with investigative and subpoena powers equal to or greater than those of federal agencies.

Clearly, if Congress intended private trustees to be federal agencies, it would have so provided.[9] This Court has repeatedly condemned attempts, even by governmental agencies, to exercise investigative powers as wholesale fishing expeditions. *See, e.g., Donovan* v. *Lone Steer, Inc.*, ___ U.S. ___, 104 S. Ct. 769 (1984); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (declaring unconstitutional the provisions of the Occupational Safety and Health Act of 1970 (OSHA) authorizing inspectors to enter an employer's property without a warrant); *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967); *U.S.* v. *Morton Salt Co.*, 338 U.S. 632 (1950) (requiring Federal Trade Commission information requests be reasonably relevant to its investigation).

Although the Secretary of Labor under ERISA must have reasonable cause to conduct on-site audits, the Funds want to act without reasonable cause. The Sixth Circuit noted that it would be "unlikely that Congress would have imposed a good cause predicate to investigations by the Secretary of Labor but intended that benefit fund trustees have the duty to examine all records." 698 F.2d 811n.5. It is incongruous to assume that the Internal Revenue Service and Department of Labor need *express* statutory authority to act, but that private parties, like the Funds have an equal or greater power *inferred* from a statute.

C. A Duty to Audit is Not Implied Because the Funds Do Not Need it.

1. The Funds Will Not be Liable for Failure to Investigate Records of Non-Participants.

The Funds state that if they do not conduct an audit of confidential records of non-covered employees to seek out

[9] It is doubtful that such a delegation of governmental power would even be constitutional if it had been made and it would be an extraordinary exercise of judicial authority to create a *de facto* federal agency.

additional participants, the Funds' trustees themselves will be liable to all potential participants who are not so found. Nothing could be further from the truth. If this Court finds that the Funds' trustees do *not* have the power to audit those records, then they have no duty to exercise that power. But, under the Funds' theory, if this Court implies the power to investigate confidential records to seek out potential participants, the Funds must exercise it by annually auditing the records of *all* employees of the 12,000 employers who contribute to the Funds.

Even if a duty and power were found, the Funds can only be liable if they have acted arbitrarily and capriciously. Since the Funds can only exercise their powers as a prudent man, an imprudent action or failure to act by the Funds will not result in their liability as long as it is not so outrageously imprudent as to be arbitrary and capricious. Moreover, the Funds' trustees will not be liable for failing to benefit employees who do not qualify as participants under the Collective Bargaining Agreement. The expenditure of funds to conduct such an audit without reasonable cause to believe a particular employee should be a participant is an imprudent and unreasonable expenditure of trust fund monies as found by the unanimous decision of the Court of Appeals. *Central Transport* at 811. Its expenditure under such circumstances would be arbitrary and capricious. *Id.*

2. The Union and ERISA Provide Adequate Safeguards Against Employer Misconduct.

Employees are already adequately protected without implying these unwarranted powers in the Funds. The employer may be sued by the Union, by the employee or the Department of Labor and it is subject to serious financial sanctions by the Internal Revenue Service. There is simply no incentive for Transport to fail to report individuals who perform bargaining unit work: All employees should qualify for some health plan and some pension plan paid for by Transport anyway, whether the Funds' plan or other Taft-Hartley plans or Transport's Company Plan and Transport would be liable for unpaid contributions to the extent a worker has been misidentified.

3. ERISA's Auditing and Reporting Provisions Do Not Require Examination of Non-Participants' Records.

Arthur Young & Company's *amicus* brief erroneously suggests that an accountant cannot issue an ERISA opinion of Funds solvency unless the trustees can audit records of non-participants. Accounting rules are drafted to conform to federal law as it is judicially interpreted. If this Court finds that trustees cannot force the investigation of non-participants' records, the failure to do so will not be penalized by the accounting profession. Moreover, Arthur Young itself issued an unqualified opinion for the period of time in which Transport and others refused access of the Funds to non-participants' records! (App. "D", p. 32a). The *amicus* brief filed by Deloitte Haskins & Sells lays to rest the fears espoused by Arthur Young.

D. Creation of an Implied Federal Common Law Right to Audit Records of Non-Covered Employees Would Provide Disasterous Effects to Employers, Employees and ERISA Trustees.

1. The Employers: Audits of Numerous Records of Non-Covered Participants Adds an Unanticipated and Self-Defeating Cost to Trust Fund Maintenance.

If benefit plans cost more than employers can afford, employers will not maintain them or create new plans. Congress drafted the law with that practical consideration in mind. H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4682.

Many employers hire workers from several different unions, each with a different Taft-Hartley plan. Unions commonly have different Taft-Hartley plans for different geographic regions of the country. For such an employer, if each Taft-Hartley fund audits the records of all employees, the costs in personnel, time and money will cripple the company.

2. The Employees: Investigations of Records of Non-Covered Employees Will Engender Large Amounts of Litigation.

Many employers maintain more than one benefit plan. ERISA does not require participation in *every* plan by *every*

employee; it does not favor one plan contributed to by an employer over another plan contributed to by the same employer. For employers with more than one plan, trustee investigations may merely result in removing a targeted employee from one plan and placing him in another. The power to conduct these investigations is not aimed at fulfilling a fiduciary obligation to new participants. It is an attempt to make the Funds even larger and to give them the weapon of unrestricted audit to coerce employers into financial settlements of alleged delinquent contributions.

The threat is real. Central States is presently demanding records from employers on the strength of the *Central Transport district court* opinion without advising the employers that the trial court decision has been reversed! (App. "E", p. 34a). The trustees of these Funds have not demonstrated that they deserve such unbridled power.

Transport maintains a single-employer sponsored, ERISA qualified, defined benefit pension plan. All full time employees who meet an ERISA approved definition of participant are eligible to participate, except for union employees who receive a benefit under a Taft-Hartley pension plan to which Transport contributes. A participant must complete 10 years of covered service as a qualified participant to receive a vested pension. If a participant with 9 years of credited service in the Company Plan is removed to become a participant in the Funds, he will forfeit his 9 years of credit. That has little to recommend it.

If ERISA implies a fiduciary duty in all ERISA trustees to conduct audits designed to *add* additional participants to their respective plans, the trustee of any plan in which the targeted employee *presently* participates must have a competing implied fiduciary duty to *resist the loss* of a participant to the plan which that trustee administers. The power the Funds seek will lead to lawsuits between trustees who will be fighting over whether an employee is a participant in their respective plans.

Additionally, if a Taft-Hartley trustee can assert that a participant of another Taft-Hartley plan belongs in his plan, the symmetry between collective bargaining agreements and the compensation they require will be destroyed. The inves-

tigating trustee will sue the employer for past due contributions. The employer may not be able to pay the plaintiff trustee due to the LMRA § 302, 29 U.S.C. § 186. Therefore, the employer will file an affirmative defense that he has a collective bargaining agreement requirement to pay contributions to the employee's present plan. Ultimately, the trustees will litigate among themselves. Of course, the local unions will have to be made parties as well since the duty to contribute to a Taft-Hartley plan must be the result of collective bargaining. The result is a massive increase in litigation.

3. The Trustees: Implying a Duty to Investigate Records of Non-Covered Employees Will Create a Staggering Burden and Certain Liability Upon Unsuspecting Trustees.

If tne power to audit is implied in ERISA, it has been implied since ERISA was effective in 1975, not merely since the Funds concocted their theory! If this Court finds an implied power and if the Funds will be liable for non-exercise of that power, the Funds will have practically admitted the liability of every ERISA trustee for its failure to audit non-participants' records for over *ten years* — even though the trustees did not know they had the power! Assuming some records indicate contributions are unpaid, the courts must identify which of numerous past employers is liable. Difficult questions of successor liability for delinquent contributions will flood the courts.

If trustees owe a fiduciary duty to potential participants, the trustees cannot be content with a partial audit. If they audited 90% of Transport's non-covered workers, they would have violated their fiduciary duty to "potential participants" who may be found in the untested 10%. Similarly, if they audited 100% of the employees of 90% of the 12,000 employers who contribute, they will have violated their duty to the employees of the 10% of the employers they did not audit. If a duty is implied to undiscovered potential participants, fulfillment of that duty will be nearly impossible.

III. THE SIXTH CIRCUIT'S REASONABLE CAUSE STANDARD STRIKES THE PROPER BALANCE BETWEEN THE FUNDS' INFORMATIONAL NEEDS AND ESTABLISHED PRIVACY INTERESTS.

The "reasonable cause" standard enunciated by the Court of Appeals properly balances the Funds' fiduciary obligations against competing privacy issues. It is in keeping with *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), that the Funds' trustees not be able to investigate the records of *all* of Transport's employees, the majority of whom are *not* covered by the relevant Collective Bargaining Agreement and are *not* beneficiaries of the Funds, against the interest of Transport and its non-bargaining unit employees in maintaining the confidentiality of the employment records.

ARGUMENT

I. THE COLLECTIVE BARGAINING AGREEMENT, TRUST AGREEMENTS AND ALL PLAN DOCUMENTS RESTRICT INSPECTION RIGHTS TO EMPLOYEES COVERED BY THE COLLECTIVE BARGAINING AGREEMENT.

Article III, Section 5 of the Trust Agreements provides as follows:

> Production of Records — Each Employer shall promptly furnish to the Trustees, upon reasonable demand, the names and current addresses of its *employees*, the Social Security numbers, the hours worked by each *employee* and past industry employment history in its files and such other information as the Trustees may *reasonably* require in connection with the administration of the Trust. (emphasis added).

The Funds rely on the closing language of Section 5 to support their contention that they may audit the records of *all* Transport employees. The Funds can only require files and other information pertaining to "employees". "Employee" is defined in Article I, Section 3 of each Trust Agreement as:

> (a) A person who is employed under the terms and conditions of a collective bargaining agreement en-

> tered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer; [10]

The Trust Agreements recognize that the benefit plan provisions pertain to a limited class of employees — those *covered* by the applicable Collective Bargaining Agreement. Thus, the Trust Agreements do not grant the Funds the right to inspect Transport's employment records with regard to *all* its employees, but only those employees *covered* by the Collective Bargaining Agreement which creates Transport's obligation to contribute to the Funds.

Judge Kennedy's well-reasoned opinion for the unanimous court below found that:

> The definition of employee in Article I, section 3(a) is written in the conjunctive. A person is an employee under the trust agreements if he or she is employed under the terms and conditions of a collective bargaining agreement *and* is a person, *i.e.*, a covered employee, on whose behalf payments are required by the collective bargaining agreement.

698 F.2d at 807-08.

The Court of Appeals noted that whether the definition of "employee" in Article I, Section 3 encompasses non-covered employees for purposes of the right to inspect a contributing employer's records had previously been considered by the Eighth Circuit in *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981).[11] After carefully examining the provisions of Article I, Section 3 and Article III, Section 5 of the Trust Agreements, the Eighth Circuit ruled that the trustees' right of inspection was limited to those employees

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[10] The full text of Article I, Section 3 is set forth in App. P.C., "F", p. A-43. See also the definition of "employee" the Funds' trustees drafted in the Pension Plan document. (App. "A", p. 1a).

[11] Contrary to the assertion of the trustees, (M.B., p. 23 n. 21), *CRST* was not substantially overruled with respect to this issue by the *en*

(Footnote 11 continued on page 18)

of *CRST* who were "employees" within the meaning of Article I, Section 3. The reasoning of the Eighth Circuit on this point was specifically adopted by the Sixth Circuit. 698 F.2d at 808.

The decision of the Sixth Circuit is also consistent with NLRB decisions. The NLRB has consistently held that Taft-Hartley trustees must exercise their authority within the parameters of the applicable collective bargaining agreement. The NLRB has condemned attempts to alter the duties of collective bargaining parties as efforts to effectuate unilateral changes which would undermine the integrity of the collective bargaining process. *See, e.g., Truck Drivers Local Union No. 449, (Universal Liquor Corp.)*, 265 N.L.R.B. 1539, *enforcement denied sub nom., NLRB* v *Truck Drivers Local Union No. 449*, 728 F.2d 80 (2d Cir. 1984)[12]; *Warehousemen's Union Local 334 a/k/a Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production Teamsters Union, Local No. 582, (Halle Brothers)*, 253 N.L.R.B. 1090 (1981), *enforcement*

(Footnote 11 continued from page 17)

banc decision of the Eighth Circuit in *Robbins* v. *Prosser's Moving & Storage Co.*, 700 F.2d 433 (8th Cir. 1983), *aff'd sub nom., Schneider Moving & Storage Co.* v. *Robbins*, ___ U.S. ___, 104 S. Ct. 1844 (1984). When the Eighth Circuit issued its *en banc* decision in *Robbins* v. *Prosser's Moving & Storage Co.*, 700 F.2d 433 (8th Cir. 1983), the Court only stated that *CRST's* decision should not be read to require arbitration prior to filing a court action:

> We hold only that the trustees may come into this court without first getting the union to invoke the machinery of arbitration. To the extent *that . . . CRST* [is] . . . inconsistent with this holding . . . [it] is overruled.

Robbins at 443. The Eighth Circuit's decision in *CRST* to the extent it concerned the meaning of Article I, Section 3 and Article III, Section 5 remains viable.

The interpretation of Article I, Section 3 and Article III, Section 5 of the Trust Agreements adopted by the Sixth and Eighth Circuits is logical, consistent with the other provisions of the Trust Agreements and supported by the rules of statutory construction. Moreover, unlike the trustees' strained reading of Article I, Section 3 and Article III, Section 5, the courts' interpretation is consistent with the "plain meaning" of those provisions as understood by the Union and Transport.

[12] Although denying enforcement to the Board's decision in *Universal Liquor*, only on the basis that the trustees had not acted as agents of

(Footnote 12 continued on page 19)

denied sub nom., NLRB v. *Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production Teamsters Union, Local No. 582*, 670 F.2d 855 (9th Cir. 1982)[13]; *Local 80, Sheet Metal Workers, (Turner Brooks, Inc.)*, 161 N.L.R.B. 229 (1966).

The ERISA definition of "employee" in 29 U.S.C. § 1002(6) is "any individual employed by an employer." That definition is useful only in identifying the census of persons who may be eligible for some benefit plan to which Transport contributes. In other words, it only excludes participation of all persons who do not work for Transport. It does not determine which one of Transport's plans is the plan in which a particular employee should participate. If the *Union* and *employer* intended to define "employee" as *all* employees of Transport, they could have done so in the Collective Bargaining and Trust Agreements. If the *Funds' trustees* intended to define employee as *all* employees, they

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(Footnote 12 continued from page 18)

the union under ordinary common law principles, the Second Circuit stated:

> We agree with the Board [NLRB] that the trustees, by their actions, were coercing the Employers to accept a stipulation that had the effect of creating a midterm modification in the employers' collective bargaining agreements. Had the Union engaged directly in this coercive action, it would clearly constitute a violation of §8(b)(3). . . .
>
> There being no agency relationship between the Union and the trustees who performed the coercive act, the case must fall. But this means *only* that neither the Union nor the trustees committed an unfair labor practice. Whether the trustees have the right to impose a condition under a multi-employer pension fund on an individual employer who has not agreed to the condition in this collective bargaining agreement is another question for another day. (emphasis added)

728 F.2d at 85, 89.

[13] In *Halle Brothers*, the Board stated:

> If such unilateral changes can be made after specific rejection in collective bargaining, then bargaining is undermined. Taken to its logical conclusion, even agreed upon benefits have no certainty of constancy during the contract term if such benefits can be modified by means of the ploy used here.

253 N.L.R.B. at 1091-92.

The NLRB maintains this position despite the denial of enforcement by the Court of Appeals. Thus recently in *Universal Liquor Corp.*, 265 N.L.R.B. 1539, 1544-46 (1984), the NLRB cited *Halle Brothers* with approval.

could have done so in the Plan Documents which they drafted.[14] No document contains the definition the Funds need to find.

Congress did not intend to abrogate valid collective bargaining agreements. Congress did not say that every employee of an employer must be a participant in every benefit plan contributed to by that employer. Congress merely said that an employer cannot discriminate against an employee. The issue in this case may be disposed of by reference to the Collective Bargaining Agreement, Trust Agreements and Plan Documents.

II. ERISA DOES NOT CREATE A POWER IN THE FUNDS TO CONDUCT OVERREACHING AUDITS.

The Funds admit that the language of ERISA does not grant them the power to investigate records of non-participants. (M.D. pp. 19; 24). The Funds therefore resort to argue that such power can be *implied* from their fiduciary duties under 29 U.S.C. § 1104(a) and their obligations to administer the Plans.

Transport does not dispute that a trustee can audit *relevant* employer records. Transport made those records available to the trustees. Those records disclosed whether Transport made the contributions required of it for employees covered by the Collective Bargaining Agreement and participating in the Plans. But ERISA does not give the

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[14] The trustees adopted the Trust Agreement limitation on "Employees" when the trustees themselves drafted the Pension Plan document. In fact, that document stated that "Employee . . . shall mean", eliminating any doubt that the definition sets forth the complete universe of persons who could fall within the definition. The Pension Plan documents provide,

"Employee, as used herein, *shall mean:*

(a) A person (other than a person employed in a supervisory capacity) who has been on the payroll of an Employer for at least 30 days *who is employed under the terms and conditions of a Collective Bargaining Agreement* . . . entered into between an Employer . . and a Union. . .., and on whose behalf contributions are made or are presently *required to be made* to the Pension Fund by the Employer . . . " (emphasis added).

Funds' trustees unrestricted access to records of workers who are not "employees" within the meaning of the Trust Agreements. Those employees are not covered employees and cannot be participants. The right to audit such records is not the ordinary and necessary means of fulfilling the trustees' express obligations and fiduciary duties under ERISA. A less intrusive audit will achieve the same result. The legitimate objective of the trustees of ensuring that required contributions are made to the Funds on behalf of covered employees will be satisfied under the reasonable cause standard established by the Sixth Circuit while the legitimate interest of the contributing employers and non-covered employees to conduct their affairs without undue interference will be protected.[15]

A. The Fiduciary Duty Rules of ERISA Neither Require Nor Authorize Unrestricted Audits of Employer Records.

Congress expressly required trustees to act "solely in the interests of the participants and beneficiaries". 29 U.S.C. § 1104(a)(1). The ERISA definition of participant limits the group of employees who are "participants" to those employees *who are or who may become eligible to receive a benefit under the employee plan:*

> . . . any employee or former employee of an employer, or any member or former member of an employee organization, *who is or may become eligible to receive a benefit of any type from an employee benefit plan* which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

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[15] *See* PTE 76-1, 41 Fed. Reg. 12740 (March 26, 1976) (Section I provides a class exemption to multi-employer plans from the prohibited transaction rules of ERISA and the Code which compromise or settle claims for delinquent employer contributions if such plans have made or cause to be made reasonable, diligent and systematic efforts to collect such amounts, as are appropriate under the circumstances.) Contrary to the statement of the trustees in their brief, (M.B., p. 12), field audits were not specifically approved by the Internal Revenue Service or the Department of Labor in PTE 76-1, and in fact, the only mention of field audits in PTE 76-1 is in the preamble where the Internal Revenue Service and Department of Labor refer to written comments received from the public with respect to the proposed exemption.

29 U.S.C. § 1002(7) (emphasis added). The trustees owe no fiduciary duty to those employees who are not "employees" within the meaning of Article I, Section 3 of the Trust Agreements since they are not "participants" for purposes of ERISA.

The Sixth Circuit's interpretation of ERISA is consistent with the decision of the Eighth Circuit in *CRST* which rejected the Funds' argument that ERISA places a fiduciary obligation upon the Funds to conduct an audit beyond that contractually agreed to in the Trust Agreements:

> ERISA does not expand the right of inspection beyond that contractually agreed to. The fiduciary obligations mandated by ERISA are owed only to participants and beneficiaries. 29 U.S.C. § 1104. Participants are those employees who are or who may become eligible to receive a benefit from an employee benefit plan. 29 U.S.C. § 1002(7). Non-covered employees, that is, those employees who are not "employed under the terms and conditions of a Collective Bargaining Agreement," neither are nor can be participants or beneficiaries.

CRST at 619 (footnote omitted).

The Funds' trustees' fiduciary duty owed to participants must be exercised within the prudent man standard. The prudent man standard does not sanction fishing expeditions to attempt to expand the class of participants in the Funds. The trustees are asking this Court to hold that ERISA authorizes any conduct of plan fiduciaries that may further one of ERISA's objectives.

B. Congress Did Not Intend to Create Quasi-Federal Agencies of Private Parties.

The Funds are asking this Court to appoint them as federal agencies with powers of investigation equal to or in excess of those of the Internal Revenue Service and the Department of Labor. This incredible argument proceeds as follows:

PARAPHRASE	QUOTES FROM FUNDS' SUMMARY OF ARGUMENT
(1) ERISA does not give the Funds' trustees the express power.	(1) " . . . Congress refrained from setting forth a detailed list of specific trustee powers." (M.B., p. 19).
(2) ERISA implies the power because ERISA states a lofty objective.	(2) "Under ERISA, as under the common law of trusts, trustees have *implied* powers to achieve *express* objectives." (M.B., p. 19).
(3) Federal agencies have the power and they enforce federal law.	(3) "Case law indicates that those charged with enforcing the Internal Revenue Code and the Fair Labor Standards Act are not required to accept the representations of the subject of the inquiry." (M.B., p. 20).
(4) Pensions are regulated by federal law so we have the same power as the Internal Revenue Service and the Department of Labor.	(4) "Employee benefit funds, though private, are sufficiently affected with national public interest to permit their trustees, as federal fiduciaries, to enjoy similar investigative latitude commensurate with the nature of their task so long as they can provide safeguards to protect confidentiality." (M.B., p. 20).

What the Funds' trustees fail to grasp is that the authority of the Internal Revenue Service and the Secretary of Labor to conduct such audits has been granted by *statute*. If Congress intended to give pension fund trustees the status of federal agencies with investigatory and subpoena powers co-extensive with the Internal Revenue Service and the Secretary of Labor, ERISA would have expressly so provided. Incredibly, the Funds justify requiring governmental powers of investigation because they can do their job more efficiently if they can see whatever records they want without reasonable cause. (M.B., p. 29).

Mere expediency is no justification for unwarranted power.[16] The police could more effectively prevent crime if

[16] In spite of the benefits through the reasonable cause requirement, the Funds contend that the Sixth Circuit's reasonable cause requirement

(Footnote 16 continued on page 24)

they could act without search warrants — but due process of law requires otherwise. The Funds are mere private parties with their own motives. They want this Court to arm them with the weapons of unrestricted access to confidential records. This Court has repeatedly condemned attempts, even by governmental agencies, to exercise investigative powers as wholesale fishing expeditions. *See, e.g., Donovan* v. *Lone Steer, Inc.*, ___ U.S. ___, 104 S. Ct. 769 (1984); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (declaring unconstitutional the provisions of the Occupational Safety and Health Act of 1970 (OSHA) authorizing inspectors to enter an employer's property without a warrant); *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967); *U.S.* v. *Morton Salt Co.*, 338 U.S. 632 (1950) (requiring Federal Trade Commission information requests be reasonably relevant to its investigation).

(Footnote 16 continued from page 23)

has been rejected by this Court in analogous situations. Cited for this authority are: *U.S.* v. *Powell*, 379 U.S. 48 (1964); *U.S.* v. *Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). These three decisions uphold the subpoena power of *governmental agencies* and are easily distinguishable from the instant fact situation.

First, the governmental agencies involved were explicitly granted broad powers of investigation by Congress. In *Powell*, this Court observed that § 7602 of the Internal Revenue Code confers broad investigative power on the Internal Revenue Service and it could find nothing in the legislative history of the Code which restricted that power to situations where probable cause could be shown. 379 U.S. at 53, 54. The Federal Trade Commission is also explicitly vested with broad investigative powers under § 6 of the Federal Trade Commission Act, 15 U.S.C. § 45, and thus this Court refused to imply a probable cause requirement for demanding special reports from an employer. *Morton Salt* at 649-50.

Additionally, the Secretary under the Fair Labor Standards Act is empowered to "enter and inspect such places and such records (and make such transcriptions), question such employees and investigate such facts . . . as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act . . . ." 29 U.S.C § 211(a). This Court, in light of an explicit grant of broad investigative authority, interpreted the statute as not requiring a probable cause determination. In fact, congressional authorization was considered by this Court to be a prerequisite to the exercise of the Secretary's subpoena power. This Court held that the Secretary must allege that he is proceeding with his investigation in accordance with the mandate of Congress. *Oklahoma Press*, 327 U.S. at 216.

The Funds are not even satisfied with powers equal to the federal government — they want more. The power to conduct an overreaching on-site audit would *imply* greater power for the trustees than that *explicitly* granted to the Secretary of Labor under ERISA. The Court of Appeals recognized that the Secretary's on-site subpoena authority is constrained by a requirement of reasonable cause, and thus it would be "unlikely that Congress would have imposed a good cause predicate to investigations by the Secretary of Labor but intended that benefit fund trustees have the duty to examine all records." 698 F.2d 811n.5. Congress required reasonable cause for the Secretary's on-site investigations because of the enormous potential for harassment inherent in such an investigation.[17] The possibility for harassment is far greater from the Funds' audits than from investigations by the Secretary of Labor.

C. A Duty to Audit is Not Implied Because the Funds Do Not Need It.

1. The Funds Will Not Be Liable For Failure to Investigate Records of Non-Participants.

The Funds believe they will be protected from liability to non-participants who sue the Funds for a benefit if the Funds have the power to audit records of non-participants.[18] Just the opposite is true. If this Court finds that the Funds' trustees do *not* have the power to audit the records of non-participants, they have no duty to exercise that power. If the Funds have no duty to exercise a power, they cannot have liability to an excluded employee for its non-exercise. The Funds will have insulated themselves from liability by appealing the Court of Appeals' decision. However, under the Funds' theory, if this Court finds that they *have* the power and they do not exercise it, they will be liable to any excluded employee who would have been found to be a participant by exercise of their audit power.

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[17] *See Donovan* v. *Peterson, Sullivan & Co.*, 3 E.B.C. 2139 (W.D. Wash. 1982).

[18] While no court has imposed such a requirement, the Funds and their *amici* cite dicta from *Van Gunten* v. *Central States, Southeast and*

(Footnote 18 continued on page 26)

The Funds' trustees have confused the standard of review of their power to act with the standard of review of their breach of fiduciary duty. ERISA requires the trustees to act as a "prudent man" would act in fulfilling his fiduciary duties. 29 U.S.C. § 1104.[19] But federal court

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(Footnote 18 continued from page 25)

Southwest Areas Pension Fund, 672 F.2d 586 (6th Cir. 1982). In *Van Gunten*, the court held that the trustees did not act arbitrarily and capriciously in denying benefits to plaintiff, a 6% shareholder and vice-president of the employer, because he was not a member of the bargaining unit. In dicta, the court expressly noted "to emphasize the limits of our holding", *id.* at 589, that wrongful failure of an employer to contribute for an employee should not deny the employee his pension. *Id.* Consequently, the Funds assert that to maintain the integrity of the trust, they must be able to independently ascertain whether contributions have been made for all eligible individuals.

The Funds also assert that the duty to notify participants of their account status, established in *Rosen* v. *Hotel & Restaurant Employees and Bartenders Union of Philadelphia, Bucks, Montgomery and Delaware Counties*, 637 F.2d 592 (3d Cir. 1981), creates an implied power to conduct an overreaching audit. *Rosen*, however, must be evaluated in light of its unique factual situation and, so read, does not support the necessity of using overreaching audits. Rosen was a dues-paying member of the union, and was therefore eligible for pension benefits. The trustees also knew about the employer's delinquency from 1971 through 1976 and failed to contact Rosen. Clearly then, the case merely stands for the proposition that when the trustees become aware of a delinquency in contributions, it is arbitrary and capricious not to inform the beneficiary.

[19] The legislative history is clear that ERISA places a twofold duty on a plan fiduciary:

> to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated, *and in accordance with* the documents and instruments *governing the fund* unless they are inconsistent with the fiduciary principles of the section.

H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4651. (emphasis added).

Thus Congress did not intend for trustees to *go beyond* the document creating the trust or to *expand* the definitions of participants and beneficiaries in those documents in order to act as a prudent man.

decisions[20] have found trustees liable to potential beneficiaries only if their denial of benefits was "arbitrary and capricious".[21]

Further, the Funds' trustees will not be liable for failing to benefit employees who do not qualify as participants under the Collective Bargaining Agreement. This Court succinctly stated in *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982) that the common law of trusts cannot abrogate the limitations of coverage drafted into the plan documents:

> By the terms of the trust created by that agreement, the trustees are obligated to enforce these determinations unless modification is required to comply with applicable federal law. The common law of trusts does not alter this obligation. Absent conflict with federal law, then, the trustees breached no fiduciary duties in administering the 1950 Benefit Trust in accordance with the terms established in the 1974 collective-bargaining agreement.

Id. at 573-74. (citations and footnote omitted).

The final fallacy of the Funds' argument is that the integrity of the trust cannot be placed in jeopardy even if benefits must be paid where no contributions have been

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[20] The trustees mistakenly allege that a federal court may only challenge a trustees' actions if they are arbitrary and capricious. (M.B., p. 42). A court should not use the arbitrary and capricious standard when interpreting a statute. *Winer* v. *Edison Bros. Stores Pension Plan*, 593 F.2d 307, 312 (8th. Cir. 1979). Whether a right to audit is implied under ERISA and if implied can abrogate specific provisions of a Collective Bargaining Agreement is a *question of law*. The Sixth Circuit appropriately issued its opinion.

[21] The "arbitrary and capricious" standard for trustee liability was initially developed from Section 302(c)(5) of the LMRA. A trustee under the LMRA must use pension contributions "for the sole and exclusive benefit of the employees . . ." 29 U.S.C. § 186(c)(5). The courts have interpreted this provision to preclude reversing a trustee's benefit allocation unless it is arbitrary and capricious under the LMRA, *Rehmar* v. *Smith*, 555 F.2d 1362 (9th Cir. 1976), and under ERISA. *Struble* v. *New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333 (3d Cir. 1984).

received. It is axiomatic, and indeed the Funds have even conceded, that if benefits are paid to Transport employees, Transport would be liable for the delinquent contributions. *Central Transport*, 698 F.2d at 813. The mere possibility that Transport may someday become insolvent and thus be unable to reimburse the Funds cannot support the power to conduct overreaching audits. This is especially true in light of the checks and incentives for accurate reporting that exist in the Collective Bargaining Agreement, Plan Documents and in ERISA itself.[22]

The Funds and their *amici* claim that the inability to audit payroll records of all employees will significantly curtail the collection of delinquent contributions. The only Supreme Court authority they cite is *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983). The *Jim McNeff* petitioner was a subcontractor working for a general contractor bound by the Master Labor Agreement ("Master Agreement") with the International Union of Operating Engineers ("Engineers' Union"). The Master Agreement contained clauses requiring all subcontractors hired by the general contractor to sign the Master Agreement and direct their employees to become members of the Engineers' Union. Both the Engineers' Union and general contractor insisted that McNeff sign the Master Agreement. Subsequent to the signing, all the subcontractor's employees became members of the Engineers' Union.

The Master Agreement also required employers to make contributions on behalf of each employee to the Engineers' Union Pension Fund. McNeff filed the required forms but failed to include any contributions, stating that "no mem-

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[22] As the Supreme Court recognized in *National R.R. Passengers Corp.* v. *National Association of R.R. Passengers*, 414 U.S. 453, 458 (1974):

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills* v. *United States*, 278 U.S. 282, 289, 73 L. Ed 379, 49 S Ct 129 (1929). This principle of statutory construction reflects an ancient maxim — *expressio unius est exclusio alterius*.

bers of this craft were employed during this month." The trustees requested an audit to verify these records and the employer "refused".[23] Subsequently, the trustees filed suit under Section 301(a) of the LMRA. 29 U.S.C. §185(a).

These facts indicate that reasonable cause either existed or was easily ascertainable. All employees of the subcontractor were made members of the Engineers' Union and those employees were working on the job site. It would be impossible, under the foregoing facts, that the employer was not required to remit pension plan contributions on behalf of these employees. Thus a clear violation existed which certainly provided the trustees with reasonable cause. Moreover, since the Engineers' Union was in control of the pension fund, these allegations could easily be substantiated.

2. The Union and ERISA Provide Adequate Safeguards Against Employer Misconduct.

The Funds paint the picture that unless *they* have the right to audit the employers' records of non-participants, employers would be able to keep participants ignorant of their rights. However, the Funds are careful to ignore the relationship which Congress created between ERISA's reporting requirements and the sanctions which may be imposed under the LMRA against an employer who breaches its collective bargaining agreement.

The Funds erroneously assert that Transport unilaterally determines which employees are covered by the Collective Bargaining Agreement and are therefore eligible for benefits under the Trust Agreements. The fact, of course, is that the Union and Transport through the collective bargaining process have specified in the Collective Bargaining Agreement those categories of employees covered by the Agreement who may be participants in the Funds, *i.e.*, the bargaining unit. The actual list of participating employees is first determined by the *Union*, not Transport. Article 3, Section 3 of the Collective Bargaining Agreement provides:

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[23] In fact, the employer "purported to agree but postponed the audit several times," and the audit never took place. *Jim McNeff* at 1755-56.

> The Local Union shall certify to the Employer in writing each month a list of its members working for the Employer who have furnished to the Employer the required authorization, together with an itemized statement of dues, initiation fees (full or installment), or uniform assessments owed and to be deducted for such month from the pay of such member, and the Employer shall deduct such amount from the first paycheck following receipt of statement of certification of the member and remit to the Local Union in one lump sum. The Employer shall add to the list submitted by the Local Union the names of all regular new employees hired since the last list was submitted and delete the names of employees who are no longer employed. Check-off shall be on a monthly or quarterly basis at the option of the Union.

The NLRB has repeatedly held that federal labor policy *requires* that the integrity of the collective bargaining process should not be undermined. *Universal Liquor*, 265 N.L.R.B. 1539 (1984). Any attempts by the Funds to modify the employee group covered by the Collective Bargaining Agreement, *i.e.*, the participants, would be contrary to federal labor policy.

The Union, through its stewards and other agents and in fulfillment of its duty of fair representation, monitors employer compliance with all provisions of the Collective Bargaining Agreement, including the rights of employees in the bargaining unit to be participants. In the present case, the Union monitors compliance with the Collective Bargaining Agreement by having Union stewards present at Transport's various places of business to insure that all Union employees are treated in accordance with the Agreement and are placed on the bargaining unit's seniority list.[24]

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[24] The existence of the employer union mechanism for determining coverage of employees — a mechanism based upon the competing and sometimes adverse interests of unrelated and distinct parties — assures the Funds that Transport contributes to the Funds in accordance with the Collective Bargaining Agreement. The Union also has incentives to insure workers are properly classified. The Union owes its members the duty of

(Footnote 24 continued on page 31)

Transport posts the seniority lists at home terminals, where they are subject to the scrutiny of the employees. When a dispute arises between the Union and Transport whether a particular employee is covered by the Agreement, the parties to the Agreement follow the grievance and arbitration procedures for resolution of the dispute.[25] Also an employee, again at no cost, may file an unfair labor practice charge with the NLRB against the employer for failure to comply with the Agreement by failing to make the requisite contributions.[26]

(Footnote 24 continued from page 30)

fair representation. *Steele* v. *Louisville & N. R.*, 323 U.S. 192 (1944). Matters relating to the administration of a collective bargaining agreement are within the duty of fair representation. *Retana* v. *Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14, AFL-CIO*, 453 F.2d 1018 (9th Cir. 1972). This duty does not end when collective bargaining agreements have been executed. *Conley* v. *Gibson*, 355 U.S. 41 (1957).

[25] Failure by the union to process a grievance on behalf of the employee would constitute a breach of its duty of fair representation. This Court long ago imposed sanctions on unions which disregard such duties and provided remedies for the victims. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The employee would not have to utilize his own resources in order to prosecute the union, if the latter refuses to process his grievance. Congress, through the creation of the NLRB, insured that the government, not the employees, would finance any such litigation. Thus, if the union disregards the employee's grievance, the employee would file, free of charge, an unfair labor practice charge with the NLRB. The NLRB has consistently held, with court approval, that a union which fails to investigate the merits of a grievance or complaint from a unit member (irrespective of union membership) with respect to a violation of the collective bargaining agreement violates its duty of fair representation. *See e.g., Massachusetts Laborers' District Council*, 230 N.L.R.B. 640 (1977); *United Steel Workers of America, Local 8093, AFL-CIO-CLC (Kennecott Copper Corp.)*, 225 N.L.R.B. 802 (1976); *Western Exterminator Co.*, 223 N.L.R.B. 1270 (1976); *International Association of Machinists and Aerospace Workers, Local Union No. 697, AFL-CIO (H.O. Canfield Rubber Co. of Virginia Inc.)*, 223 N.L.R.B. 832 (1976).

Last year in *Bowen* v. *U.S. Postal Service*, 459 U.S. 212 (1983), this Court resolved the question of the allocation of backpay between the employer and the union in a breach of duty of fair representation case.

[26] Such failure by the employer constitutes a unilateral change in terms and conditions of employment violative of §8(a)(5) of the LMRA. 29 U.S.C. §158(a)(5). The remedy would be to pay the contributions in question and to make the employees, victims of the violation, whole for any damages suffered. *NLRB* v. *Strong*, 393 U.S. 357 (1969); *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967); *NLRB* v. *Katz*, 369 U.S. 736,

(Footnote 26 continued on page 32)

The Funds assert that they cannot rely on the Union to represent an individual employee who claims he should be part of the bargaining unit because the Union owes a duty of fair representation to the bargaining unit as a whole and may sacrifice the good of the individual for the good of the collective whole. (M.B., p. 38). The Funds say they are different — they owe a fiduciary duty to each and every non-covered employee.[27] If so, the Funds' trustees cannot be content with a partial audit. If they audit 90% of an employer's non-covered workers, they will have violated their fiduciary duty to "potential participants" who may be found in the untested 10%. Similarly, if they audit 100% of the employees of 90% of the 12,000 employers who contribute to the Funds, they will have violated their duty to the employees of the 10% of the employers they do not audit.

The Funds concede that the Collective Bargaining Agreement specifies the classifications of employees covered by the Agreement and thereby defines the bargaining unit and the employees who are entitled to participation. An employee would be able to determine whether he is participating in the Fund by simply reading his Collective Bargaining Agreement.

Since every full time employee who meets the ERISA definition of employee is capable of participating in some plan maintained by or contributed to by Transport, receipt by the employee of an ERISA notice placing him in the single employer medical plan or pension plan would put the employee on notice that he is not a participant in the Union sponsored plans. Further, the failure to receive ERISA reports from the Funds would put a covered employee, *i.e.*,

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(Footnote 26 continued from page 31)

743 (1962); *Peerless Roofing Co.* v. *NLRB*, 641 F.2d 734 (9th Cir. 1981). Any "person", a term which includes anyone — employee, employer, union, *trust fund*, etc. — may file an unfair labor practice charge with the NLRB. LMRA §2(1), 29 U.S.C. §102(1).

[27] *But see Nichols* v. *Trustees of Asbestos Workers Pension Plan*, 3 E.B.C. 1726 (D.D.C. 1982), wherein the court found that Taft-Hartley fund trustees must act in the best interests of the participant class as a whole.

a participant, on notice that he is not being reported — the evil which the Funds allegedly seek to avoid through general audits. Employees are keenly aware of the benefits their co-workers enjoy; they will know if another employee is receiving a benefit they do not receive.

An employee himself may request that the trustees investigate his records.[28] The employee's concerns about unauthorized disclosure of records would then be moot. The questions remaining would be whether a prudent man would expend the time and money necessary to investigate that employee's records and whether Transport's interest in maintaining the confidentiality of its personnel files outweighs the importance of the trustees' desire to audit the records of that particular employee.

The Funds concede they have the obligation under ERISA to provide summary plan descriptions, amendments thereto and benefit status reports to participants on a regular basis. 29 U.S.C. §§ 1022, 1024, and 1025. Indeed, Congress mandates that those notices be understandable and that they be posted in the work place so that the affected employees become aware of their rights to proper notice. It is therefore extremely unlikely that an employee who has not received any such reports from the Funds would nevertheless believe that he is a participant and therefore would present the Funds with a claim for benefits.

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[28] It is quite proper to place a portion of the reporting burden on employees. In *Nichols*, 3 E.B.C. at 1732n.4, a case heavily relied upon by the Funds, the district court found that reciprocal agreements between pension trusts in different regions which placed some of the responsibility to report hours worked on the employees were not arbitrary and capricious uses of trustee authority. Under the *Nichols* agreements, employees were sent schedules of hours worked and asked to correct any inaccuracy. The burden on employees of Transport would be far less than that placed on the employees in *Nichols*. Transport's employees would not be required to examine the number of hours that they have worked, but rather only to ascertain whether they are, or should be members of the bargaining unit. Moreover, the Funds quote extensively from *Nichols* to allege that the prudent man standard requires certain actions to verify participation. *Nichols* required the trustees to speak to the employer and participants and not to non-covered employees as the Funds would have this Court believe. *Id.* at 1732.

In addition to the contractual mechanisms for determining coverage, ERISA and the Internal Revenue Code provide methods for insuring the accuracy of Transport's reporting as well as potent sanctions for failing to report accurately. ERISA grants the Secretary of Labor broad authority to investigate whether any person has violated or is about to violate any provisions of Sections 2 through 514 of ERISA. 29 U.S.C. § 1134. The Secretary, acting on the complaint of the Funds, Union, or any participant, can inspect Transport's employment records for ERISA violations. *See* 29 C.F.R. § 2560.502-1. The Internal Revenue Code § 4971(a)[29] imposes a tax of five (5%) percent on the amount of an employer's accumulated funding deficiency. A funding deficiency could occur if contributing employers, such as Transport, fail to make proper contributions for an employee on whose behalf the Collective Bargaining Agreement required a contribution. I.R.C. § 412. If an employer fails to pay an accumulated funding deficiency within 90 days after the date of mailing a deficiency notice, an additional tax equal to 100% of the accumulated funding deficiency could be imposed upon the delinquent employer. I.R.C. § 4971(b). In the case of multi-employer plans, such as those administered by the Funds, the delinquent employer, and not the plan administrator, is liable for the tax. I.R.C. § 413(b)(6).

There is simply no incentive for Transport to fail to report individuals who perform bargaining unit work: All employees should qualify for some health plan and some pension plan anyway, whether the Funds' plans, other Taft-Hartley plans, or Transport's single-employer plan; and Transport would also be liable for unpaid contributions to the extent a worker has been misidentified.

3. ERISA's Auditing and Reporting Provisions Do Not Require Examination of Non-Participants' Records.

Arthur Young & Company's ("AY") *amicus* brief suggests that ERISA's auditing and reporting provisions require examination of non-participants' records by the

[29] References to "I.R.C. § " are to corresponding Sections of the Internal Revenue Code of 1954.

Funds or AY would have to qualify their annual opinion concerning the Funds' solvency. That is not true legally or factually: *First*, accounting rules are formulated to conform with statutory requirements. If this Court finds that ERISA trustees do not have the power to audit records of non-participants, accounting rules will be altered to avoid "penalizing" trustees by issuance of a qualified opinion from their accountants for not exercising a power they do not have. *Second*, if AY must issue a qualification to its opinion if the Funds' trustees do not audit non-participants' records, AY should have qualified its 1981 and 1982 annual report due to the refusal of Transport and others to permit the audit of non-participant records prior to and during that year. AY instead issued an *unqualified* opinion. (App. "D" p. 32a).

The *amicus* brief of Deloitte Haskins & Sells dispells the false fears raised by AY and sets into proper perspective the limited role of the accountant under ERISA. Surely, broad investigative powers cannot be read into federal law simply to make accountants more comfortable.

D. Creation of an Implied Federal Common Law Right to Audit Records of Non-Covered Employees Would Provide Disasterous Effects to Employers, Employees and ERISA Trustees.

1. The Employers: Audits of Numerous Records of Non-Covered Participants Adds an Unanticipated and Self-Defeating Cost to Trust Fund Maintenance.

If benefit plans cost more than employers can afford, employers will not maintain them or create new plans. Congress recognized that welfare plans are voluntary and that overregulation would discourage the maintenance of plans by forcing expanded coverage upon the employer:

> Generally, it would appear that the wider or more comprehensive the coverage, vesting, and funding, the more desirable it is from the standpoint of national policy. However, since these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon

> employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer. If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions and related plans.

H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4682.

Many employers hire workers from several different unions, each with a different Taft-Hartley plan. Unions commonly have different Taft-Hartley plans for different geographic regions of the country. For such an employer, if each Taft-Hartley fund audits the records of *all* employees, the cost in personnel, time, and money would cripple the company.[30] Two of these very Respondents have received a demand from another Teamsters Taft-Hartley Plan for records of *all* employees. Upon refusal, Quad States Leasing was thrown out of the plan and multiemployer pension withdrawal liability was calculated despite the fact that Quad States Leasing continued to make all payments. (App. "F", p. 41a).

For instance, the audit of only covered employees at Transport continued for over two months. Those employees accounted for only 40% of Transport's work force. Add to that the additional 60% of the work force the Funds wish to see plus the additional records they now demand; consider that Transport is only 16 of the 12,000 employers who operate under collective bargaining agreements with the Teamsters Union and that the pension plan administered by the Funds are only 1 of the 2,000 Pension Plans; the result is a staggering expenditure of time and money. If each plan has a duty in its annual audits to fight for the inclusion of every employee in its plan, trustees and employers will have time to do nothing but audit. Congress could never have intended that result.

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[30] The Honorable Al Ullman, ranking majority member of the House Committee on Ways and Means emphasized Congressional awareness of

(Footnote 30 continued on page 37)

2. The Employees: Investigations of Records of Non-Covered Employees Will Engender Large Amounts Of Litigation.

Many employers maintain more than one benefit plan. ERISA does not require participation in *every* plan by *every* employee; it does not favor one plan contributed to by an employer over another plan contributed to by the same employer. For employers with more than one plan, trustee investigations may merely result in removing a targeted employee from one plan and placing him in another. The power to conduct these investigations is not aimed at fulfilling a fiduciary obligation to new participants. It is an attempt to make the Funds even larger and to give them the weapon of unrestricted audit to coerce employers into financial settlements of alleged delinquent contributions. If the Funds have the power to invade the employer's records for months at a time without cause to do so, the threat of commencing such an investigation carries awesome weight. And the threat is real. Central States is presently demanding records from employers on the strength of the *Central Transport district court* opinion without advising the employers that the trial court decision has been reversed! (App. "E", p. 34a). The trustees of these Funds have not demonstrated that they deserve such unbridled power.[31]

The Funds assert that ERISA implies a fiduciary duty in all ERISA trustees to conduct audits designed to *add* additional participants to their respective plans. If so, the trustee of any plan in which the targeted employee *presently* participates must have a competing implied fiduciary duty

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(Footnote 30 continued from page 36)

a cost-benefit analysis relative to passing ERISA when he advised Congress on August 20, 1974:

> It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, *particularly for employers who generally foot most of the bill.* This would be self defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed.

120 Cong. Rec. H8702 (August 20, 1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5167. (emphasis added).

[31] See n. 1.

to *resist the loss* of a participant to the plan that that trustee administers. The type of litigation aimed at deciding what union represents the work required to complete a particular task will be doubled by adding a similar lawsuit between plan trustees litigating over covering an employee under competing plans.

Transport maintains a single-employer sponsored, ERISA qualified, defined benefit pension plan. All full time employees who meet an ERISA approved definition of participant are eligible to participate, except for union employees who receive a benefit under a Taft-Hartley pension plan to which Transport contributes. A participant must complete 10 years of covered service as a qualified participant to receive a vested pension. If a participant with 9 years of credited service would be made a participant to the Funds, he would forfeit his 9 years of credit in the Company Plan!

Additionally, if a Taft-Hartley trustee can assert that a participant from another Taft-Hartley plan belongs in his plan, the symmetry between collective bargaining agreements and the compensation they require will be destroyed. Assume, for example, Employer executes collective bargaining agreement A with Union A for all employees performing work described in Agreement A. Among its provisions, Agreement A creates Taft-Hartley Plan A. Under its collective bargaining agreement, Union A agrees to weekly wages of $80 per week per employee in order to get a $30 per week contribution to the Taft-Hartley Plan A, for a total weekly compensation package of $110. Employer also executes collective bargaining agreement B with Union B for all employees performing work described in Agreement B. Among its provisions, Agreement B creates Taft-Hartley Plan B. Under its collective bargaining agreement, Union B insists on weekly wages of $100 per week per employee and agrees to only $10 per week contribution to the Taft-Hartley Plan B for a total weekly compensation package of $110. If the Trustees of Plan B audit Employer's records and assert that certain Union A members are doing Agreement B bargaining unit work and

sue Employer for delinquent contributions, the parties will be affected as follows:

(1) *TARGETED EMPLOYEE:* As a member of Union A and a participant in Plan B, if Trustee B is successful, Targeted Employee would receive $80 in wages under Agreement A and $10 in fringe benefits under Plan B for a total weekly compensation of $90, rather than the $110 for which he bargained.

(2) *UNION A:* Since Union A is not a party to the audit or the lawsuit, Union A will certainly not voluntarily release the employee to membership in Union B, so that Targeted Employee would be a Union A member but a Plan B participant.

(3) *TRUSTEE A:* Trustee A will either (a) receive a $30 contribution and have an implied fiduciary duty to try to retain that contribution for the benefit of Targeted Employee under Plan A by suing Trustee B and Employer or (b) not receive the $30 contribution and sue Employer for that amount.

(4) *EMPLOYER:* Employer has a contractual obligation to pay both wages and fringe benefits under Collective Bargaining Agreement A. That obligation may or may not be affected by a lawsuit to which Union A is not a party. Accordingly, Employer may have to contribute to both Plans A and B although Targeted Employee will not receive the benefit of the contribution and/or Employer may make Union A a party to the lawsuit brought by Trustee B. However, an employer may be prohibited under §302 of the LMRA, 29 U.S.C. §186, from contributing to a plan except pursuant to a written agreement, *i.e.*, the collective bargaining agreement and trust agreement.

Suffice it to say that implying the power in the trustees without addressing the possible lack of symmetry that may result between collective bargaining agreements and Taft-Hartley plans will engender litigation rather than avoid it. If

Taft-Hartley trustees need the power to audit records of non-covered participants, the power should be created by Congress by amending ERISA. Only Congress can build in the protections necessary to maintain the symmetry of the collective bargaining agreement and the Taft-Hartley plan and only Congress can provide that an employer will not be forced to contribute twice for the same employee.

3. The Trustees: Implying a Duty to Investigate Records of Non-Covered Employees Will Create a Staggering Burden and Certain Liability Upon Unsuspecting Trustees.

If the power to audit is implied in ERISA, it has been implied since ERISA was effective in 1975, not merely since the Funds concocted their theory! If this Court finds an implied power, and if the Funds will be liable for non-exercise of that power, the Funds will have practically admitted the liability of every ERISA trustee for its failure to audit non-participants' records for over *ten years* — even though the trustees did not know they had the power!

Assuming some records indicate contributions are unpaid, the courts must identify which of numerous past employers is liable. Since so much time may have passed from the date that contributions were due, difficult questions of successor liability for delinquent contributions will flood the courts. Prior employers may have changed from sole proprietorships to partnerships or to corporations or may have gone through bankruptcy or merged with other companies or been involved in any of numerous changes in control and ownership. Moreover, the Funds' trustees will create in themselves a duty to *physically find* those potential participants whose names are uncovered. Probate estates of deceased potential participants will have to be re-opened for payment of accrued benefits and beneficiaries will have to be tracked down.

All of these problems can be avoided. If this Court finds that the Funds do not have this extensive audit power under ERISA, the Funds are not liable. If Congress intended trustees to have this extensive audit power, Congress can

then amend ERISA to create that power and can provide trustee liability for *prospective* failure to exercise only or establish a reasonable claims period for allegedly excluded participants to assert their claims. But if Taft-Hartley trustees and plans are found liable for failure to exercise *implied* powers they did not know existed, many well-meaning and innocent trustees will be harmed and the financial solvency of plans threatened.

III. THE SIXTH CIRCUIT'S REASONABLE CAUSE STANDARD STRIKES THE PROPER BALANCE BETWEEN THE FUNDS' INFORMATIONAL NEEDS AND ESTABLISHED PRIVACY INTERESTS.

The Court of Appeals required the Funds to show "reasonable cause to believe that a *particular employee* is covered by the collective bargaining agreement" before the employment records of that employee may be inspected. *Central Transport*, 698 F.2d at 810 (emphasis in original). This limited right to audit will properly focus the Funds' investigation and balance the rights of employees, employers, and the Funds' trustees. Furthermore, the reasonable cause standard will actually protect the Funds from breaching their fiduciary duties by wasting Funds assets in conducting an overreaching audit. *Id.* at 811; *Scotts Abridgement of the Law of Trusts*, § 188 (1960). It will also prevent the Funds from using the threat of an expensive, disruptive, time consuming audit to force a settlement for otherwise unnecessary contributions.

The requirement of reasonable cause in *Central Transport* is consistent with this Court's recent decision in *Schneider Moving & Storage Co.* v. *Robbins*, ____ U.S. ____, 104 S. Ct. 1844 (1984). The Sixth Circuit specifically recognized the inability of the Funds to invoke the Union-employer arbitration procedure and thus gave the Funds a "reasonable cause" right of inquiry to compensate them for their lack of access to the grievance/arbitration mechanism of the Collective Bargaining Agreement. *Central Transport*, 698 F.2d at 812. That holding extends *Schneider* to its logical conclusion and balances the interests of all competing parties. The Union has an incentive to identify

all employees who are engaged in bargaining unit work. If the Funds are correct that the Union might not choose to confront an employer over the claims of a small number of employees, the employee himself may ask the Funds' trustees to review his records to determine if he is entitled to participate in the Plan. In so inquiring, the employee would have waived his right to maintain the confidentiality of his records. The only question remaining is whether there is sufficient reasonable cause to believe the employee is performing bargaining unit work for a prudent man to spend the money to conduct an audit and cause the employer to spend the time and money necessary to make the records available to the Funds' trustees.

The Funds may establish reasonable cause to investigate the records of particular employees as a result of their audit of contributions by the employer and the pertinent records of *participants* in the plans. That is how the audit of participants' records and employer contributions revealed four employees who were not on the list of persons doing bargaining unit work but for whom contributions apparently had been made. The Court of Appeals found that the Funds' trustees had reasonable cause to spend Funds money to review the records of those employees.

Schneider recognized the trustees' right to commence a proper action in federal court. How a litigant decides whether to file suit is a private matter. But once an action is commenced and the less burdensome route of arbitration is by-passed,[32] the lawsuit must be conducted under the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure give discovery rights to plaintiffs upon good cause limited by relevancy and materiality. The Funds, however, are seeking more than the Federal Rules allow. They do not want to be limited by relevancy and materiality. They do not want to show a reasonable belief that facts exist to justify filing a complaint. The Funds want subpoena rights to conduct fishing expedition audits to attempt to find facts which they have no reasonable cause to believe exist. Notably, the Funds admit in their Brief that

[32] See n. 4.

the "Central States Trust Agreements require that Trustee requests for information and records be reasonable and specifically related to the necessary and proper administration of the funds." (M.B., pp. 30-31).

The Sixth Circuit also balanced the Funds' need to audit Transport's records for probable participants against the interest of Transport and its non-bargaining unit employees in maintaining the confidentiality of the employment records of non-covered employees. The court struck the appropriate balance by finding in the trustees a

> . . . limited right of inspection and investigation . . . confined to factual situations in which the trustees have reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been placed on the Union seniority list or otherwise classified by Transport or the Union as a covered employee.

Central Transport, 698 F.2d at 811.

The "reasonable cause" standard enunciated by the Sixth Circuit also balances the Funds' fiduciary obligations against *two* privacy interests, that of the employer and of the "non-covered employees who have not bargained for the intrusion" into their records. *Id.* at 812. Balancing informational needs versus individual privacy interests is mandated by a line of this Court's decisions extending from *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977) and *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 455-65 (1977) through *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 318-20 (1979). *See also Department of the Air Force* v. *Rose*, 425 U.S. 352, 381 (1976).

In *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 318-20 (1979), the decision most similar to the present case, this Court balanced the interest of the employer and its employees in the confidentiality of tests and test scores against the asserted need of the Union to examine *all* tests and test scores in order to process employee grievances. This Court specifically recognized the interests of both

employer and employees in maintaining confidentiality. Justice Stewart, writing for the majority, stated:

> Under these circumstances, any possible impairment of the function of the Union in processing the grievances of employees is more than justified by the interests served in conditioning the disclosure of the test scores upon the consent of the very employees whose grievance is being processed. The burden on the Union in this instance is minimal. The Company's interest in preserving employee confidence in the testing program is well founded.

Id. at 319.

Moreover, in *Detroit Edison*, this Court determined that the employer was not required to comply with the Union's request for full disclosure, without regard for the confidentiality interests of both employer and employees, even though Union requests for disclosure traditionally have been afforded wide latitude by the NLRB.[33]

In weighing the asserted confidentiality interests, Justice Stewart noted that both Congress and various State legislatures have recognized the individual's interest in preserving the confidentiality of personnel files. *Id.* at 318n.16.[34] By

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[33] Since 1941, this Court has required Federal courts to defer to the expertise of the NLRB in matters of labor relations. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). *See generally* Duff & Johnson, *A Renewed Employee Right to Privacy*, 34 Lab. L. J. 747, 755 (1983). *See also Detroit Edison Co.* v. *NLRB*, 440 U.S. at 320, 330-31 (White, J., dissenting). However, in *Detroit Edison*, Justice Stewart made clear that even in the context of labor relations cases, the Court is not required to affirm a blanket disclosure order merely upon the Union's unsubstantiated request.

[34] The Privacy Act of 1974, 5 U.S.C. § 552a, and Exemptions 4 and 6 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4),(6), protect the confidentiality of personnel records. This Court has held that Congress intended Exemption 6 to apply broadly to personal information contained in Government records. *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 600-02 (1982). At present, eleven states also have enacted so called "mini Privacy Acts" which regulate access to personnel files maintained by employers. 34 Lab. L.J., *supra* note 33, at 753.

balancing the Union's claimed need to examine *all* test scores against the confidentiality interests raised by the employer, this Court approved the *conditional* disclosure which the employer had offered but the Union had stubbornly rejected. Moreover, this Court denied the Union unfettered access on a finding that the Union had provided no mechanism for protecting the confidentiality of test scores and there was no sanction for unauthorized disclosure. *Id.* at 315.

Thus, it is at least implicit in the previously cited decisions that the trustees have the burden of proving that they can preserve the confidentiality of non-covered employee records to which they seek access.[35] The Funds have proposed no mechanism for protecting the legitimate confidentiality interests of Transport and the majority of its

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[35] Congress recognized the significant public interest in access to information retained by the government by passing the FOIA, 5 U.S.C. § 552 (1966). However, Congress created specific exemptions to disclosure among which are Exemption 4 (commercial and financial records) and Exemption 6 (personnel files). In 1974, Congress reacted to an increasing public concern for the privacy rights of individual citizens which may be threatened by disclosure of information in government files by passing the Privacy Act of 1974 ("Privacy Act"), 5 U.S.C. § 552a. The Privacy Act expresses the finding of Congress that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States." 5 U.S.C. § 552a (Congressional Findings and Statement of Purpose) (1974).

Consequently, courts that have decided whether personal information should be disclosed pursuant to FOIA requests have necessarily considered the FOIA exemptions and/or the Privacy Act and have balanced the supposed need for information against the privacy interest. *See, e.g., U.S. v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980); *Wine Hobby U.S.A., Inc. v. Internal Revenue Service*, 502 F.2d 133 (3d Cir. 1974); *Local 2047, American Federation of Government Employees v. Defense General Supply Center*, 423 F. Supp. 481 (E.D. Va. 1976) aff'd. 573 F.2d 184 (4th Cir. 1978). A first consideration has been whether there is a *public interest* purpose in securing the information. Disclosure was denied in *Wine Hobby* on a finding that the requesting party asserted *no public interest purpose*, so that the invasion of privacy was "clearly unwarranted." 502 F.2d at 137. In the present case, the trustees have asserted no public interest purpose that outweighs privacy interests.

If there is a public interest purpose and the information sought is protected by either FOIA exemptions and/or the Privacy Act, the courts consider whether the *public interest* outweighs the privacy intrusion and

(Footnote 35 continued on page 46)

employees. The Funds are *not* subject to sanctions for unauthorized disclosure of confidential information. The Funds have *no* "unblemished record for discretion." *See Nixon* v. *Administrator of General Services*, 433 U.S. 425, 462 (1977) (citation omitted). There is no guarantee that the Funds will maintain the confidentiality of non-bargaining unit employees' files and, in fact, the Funds have every incentive to share information with the Union to increase the size of the bargaining unit.[36].

The risk to Transport of either deliberate or inadvertent disclosure is significant and obvious. Trustees of the Funds

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(Footnote 35 continued from page 45)

whether the information can be provided with minimal intrusion. *See Informational Privacy and Public Records*, 8 Pac.L.J. 25, 33 (1977). In *Westinghouse*, the court concluded that the public interest was substantial and the intrusion, minimal, but still conditioned disclosure on *prior notice* to affected employees who were allowed to raise their own privacy challenges. 638 F.2d at 579, 581. In *Local 2047*, the court refused to allow disclosure of personnel information to a union, *without individual consent*, even though the collective bargaining agreement between employer and union specifically authorized disclosure of such information, which was relevant to the union's function, and even though there is a valid public interest in honoring collective bargaining agreements. 423 F. Supp. at 481, 484, 486. In the case at bar, the trustees claim a unilateral right to abrogate the collective bargaining agreement by imposing a plan on an employee regardless of what his union may have agreed to in the collectively bargained contract.

Senator Harrison Williams pointed out in his explanation of ERISA to the Senate that the Social Security Administration furnishes employment data to multi-employer plans, such as the Funds in the present case, to help these plans fulfill their statutory obligations to furnish plan information to participants. However, Senator Williams noted that the Social Security Administration furnishes employee information *only pursuant to employee authorization*. 120 Cong. Rec. S29931 (daily ed. Aug. 22, 1974). Prior authorization for release of employment information must come, at a minimum, from the persons affected, *i.e.*, the employees, but the trustees do not provide even this threshhold safeguard.

[36] A noted commentator observed:

> The major practical problem for many in the joint fund and labor relations field is that they wear two hats . . . . Quite frequently the very same individuals who negotiate at the collective bargaining table for the union are the union trustees.

N.A. Levin, *Guidelines for Fiduciaries of Taft-Hartley Trusts, An ERISA Manual*, (International Foundation of Employee Benefit Plans, 1980) p. 124.

include both Union members and representatives of employers who compete with Transport. Disclosure of names, addresses, employment terms, wage rates, bills of lading, contracts with independent contractors and the like would be beneficial to Union organizers and could seriously jeopardize the integrity of Transport's business operations. Competitors could easily use wage information concerning Transport's management personnel to lure key managers with higher salary offers and contract information to offer contracts to the same independent contractors at a more advantageous price. In view of the Funds' inability to provide the kinds of assurances this Court has required to safeguard confidentiality, the Sixth Circuit's limited disclosure standard should be affirmed.

The Sixth Circuit's "reasonable cause"/limited inspection standard should also be affirmed in the interest of Transport's non-covered employees who are asked to suffer an intrusion for which they did not bargain. The investigation sought by the Funds does *not* extend to a small fraction of confidential material, a factor which this Court found significant in *Nixon* v. *Administrator of General Services*, 433 U.S. at 455-65. Rather, the Funds' investigation is all-encompassing, and the material requested is not *relevant* to the trustees' duties.[37]

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[37] Relevance is an important consideration in records disclosure cases. *See, e.g., NLRB* v. *Rockwell-Standard Corp., Transmission and Axle Division*, 410 F.2d 953 (6th Cir. 1969); *Kroger Co.* v. *NLRB*, 399 F.2d 455, 457 (6th Cir. 1968).

On appeal to the Sixth Circuit, the trustees argued that the disclosure standard applicable to LMRA cases is directly analogous to the present factual situation. The court below correctly found that the standard of disclosure in labor relations, involving information relevant to bargainable issues, is distinguishable from the present case, and further that even were the standard analogous, the trustees must bear the burden of proving relevance, which they failed to do. 698 F.2d at 812-13.

Moreover, it should be noted that even in cases involving NLRB determinations relative to the disclosure standard and purportedly bargainable issues, federal courts have, as a result of this Court's decision in *Detroit Edison*, increased their scrutiny of Board-ordered disclosure relative to confidentiality and/or limited disclosure issues. *See, e.g., Atlas Metal Parts Co., Inc.* v. *NLRB*, 660 F.2d 304 (7th Cir. 1981); *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1096-98 (1st Cir. 1981); *see also*, 34 Lab. L.J., *supra* note 33, at 754-56.

The Sixth Circuit's unanimous decision was, in part, a reaction to the growing public concern with privacy. Congress recognized and responded to that concern by writing disclosure exceptions into the FOIA even though public disclosure is the Act's purpose. Furthermore, Congress enacted the Privacy Act of 1974 which imposes on federal agencies duties of confidentiality, including the duty to seek authorization from the person affected prior to disclosure of personal information. The Privacy Act also established the Privacy Protection Study Commission which, in 1977, published its opinion that the same confidentiality safeguards applicable to federal agencies should be adopted by private entities as well.[38]

In view of the clear public policy favoring privacy, it is incumbent upon the Funds to show that the massive, intrusive audit rights they seek are justified by more than the accountants' desire to sift through the enormous amount of records which Petitioners call "pertinent" to the audit. This, they have not done. Moreover, the Funds have not and cannot demonstrate how their interests will be prejudiced if they are required to show "reasonable cause" to conduct an audit of records for any non-bargaining unit employees.[39]

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[38] *Personal Privacy in an Information Society*, Report of the Privacy Protection Study Commission at 19, 224, 270-71 (1977). Notably, the Commission stated:

> In addition, some protective labor legislation such as the Employee Retirement Income Security Act (ERISA), [P.L. 93-406, 88 Stat. 829 (1974)] underscores the increasing importance of the employer's role as provider of social and economic benefits. Yet neither the actual requirements of such legislation, nor the regulations issued by government agencies to implement it, account for its overall impact on the collection, use, and disclosure of information about employees.

Id. at 227. Therefore, the Commission goes on to recommend:

> As the *first premise* of a responsible confidentiality policy, disclosures to any outside entity without the employee's authorization should be prohibited.

Id. at 270 (emphasis added).

[39] Courts have been reluctant to impose unreasonable burdens on trustees as part of their fiduciary obligation. In *Hopkins v. F.M.C. Corp.*, 535 F. Supp. 235 (W.D.N.C. 1982), the district court refused to require

(Footnote 39 continued on page 49)

The Funds have not and indeed cannot provide adequate safeguards against the possibility of intentional or inadvertent disclosure. In short, the Funds have failed to meet their burden of persuasion that their asserted need for information *outweighs the confidentiality interests* of Transport and its employees. Therefore, the disclosure standard enunciated below and the decision of the Sixth Circuit should be affirmed.

CONCLUSION

The power to audit confidential records of employees who do not participate in the Funds is not found in the Collective Bargaining Agreement or Trust Agreements or any of the numerous Plan Documents or in the language of ERISA. Therefore, the Funds assert that an *implied power* (auditing non-participants' confidential records) is necessary to fulfill an *implied duty* (to ferret out more participants) to an *implied beneficiary* (the new participant who *may* be found by audit. This Court should not create a federal common law audit power in the trustees. This Court should not conclude that Congress *intended* to give the Funds investigative powers co-extensive with federal agencies but *chose* not to do so expressly. This Court should not imply that power in the Funds' trustees because employees are already adequately protected through their access to the Union, to the courts, to the NLRB and through the investigative rights of the Internal Revenue Service and the

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(Footnote 39 continued from page 48)

an employer trustee to explain the impact of its pension plan requirements on individual situations. The court explained that "defendant has 17,000 employees in this plant alone; it would be practically impossible to comprehensively address all of their individual concerns unsolicited." *Id.* at 239. Similarly, the duty of conducting audits utilizing all employment records is an unreasonable burden. This Court should not impose a burden on the ERISA trustees to audit records of non-union employees in the absence of reasonable cause to believe a particular employee is misidentified.

Department of Labor. Implication of the power to investigate will result in an assault on the collective bargaining process contrary to established federal labor law. Its cost will discourage maintenance of plans. Moreover, it will place an enormous power in the hands of ERISA trustees which may be used for harrassment and which will result in trustee liability unless vigorously exercised.

The unanimous decision of the Sixth Circuit Court of Appeals properly balanced competing interests of employer, union, trustee and employee. The reasonable cause standard espoused by Judge Kennedy comports with the Federal Rules of Civil Procedure, practicality and plain good sense. That decision should be affirmed.

Respectfully submitted,

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September 7, 1984

NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

RESPONDENTS' APPENDIX

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APPENDIX A

CENTRAL STATES
SOUTHEAST & SOUTHWEST AREAS
HEALTH & WELFARE FUND

Benefit Plan A

Effective April 1, 1979

Appendix A

Plan Benefits For You And Your Dependents

Participant Only

Accidental Death and Dismemberment (Chapter 2)
Total and Permanent Disability (Chapter 2)
Loss of Time (Chapter 3)

Participant, Spouse and Dependent Children to Age 19

Life Insurance (Chapter 2)
Accident and Health Benefits (Chapter 3)

- Hospital Expense Benefit
- Surgical and Obstetrical Expense Benefit
- Outpatient Diagnostic X-ray and Laboratory Expense Benefit
- Outpatient Accidental Bodily Injury Expense Benefit
- Psychiatric, Alcoholism and Drug Abuse Treatment Benefit
- Major Medical Expense Benefit

Dental Benefits (Chapter 4)
Vision Benefits (Chapter 5)

Physically Handicapped or Mentally Retarded Children Age 19 or Over

Accident and Health Benefits (Chapter 3)
Dental Benefits (Chapter 4)
Vision Benefits (Chapter 5)

Full-time Students, Ages 19 to 23

Accident and Health Benefits (Chapter 3)

Qualifications

Physically Handicapped/Mentally Retarded Children (19 or over):

Note that physically handicapped or mentally retarded children that are age 19 or over are not covered by the Life Insurance Benefit. To be eligible for Accident and

Appendix A

* * *

Definitions

Covered Participant:

An employee for whom an employer is required to make contributions to the Fund and who has met initial eligibility requirements

or

An employee covered under the Plan due to the Benefit Bank

or

An employee who is entitled to make and does make Self-Payments to the Fund.

* * *

Plan Definitions

Following are some terms used in this booklet. They are defined here as they apply to your Plan in order to aid your understanding of this booklet. The complete legal definitions of terms necessary to define your Plan are located in the Plan Document which is available for review at your Local Union.

Active Employee - You are an active employee when you are working, on paid vacation or on a strike approved by the International Brotherhood of Teamsters. You are not considered active if you are on leave of absence, sick leave, lay-off, quit or discharge.

* * *

Employee - A person covered under a collective bargaining agreement who is employed by an employer who must make contributions to the Fund. Also, a person employed by a Local Union, or a person employed by the Fund.

Employer - An employer who has a collective bargaining agreement with the union and who meets the Trustees' requirements for participation in the Fund.

Fund - The administrator of your Plan is the Central States, Southeast and Southwest Areas Health and Welfare Fund.

* * *

Participant - An employee for whom an employer is required to make contributions to the Fund; or an employee who is entitled to make and does make self-payments to the Fund, or an employee covered under the Plan due to the Benefit Bank.

Plan - Your Health and Welfare benefits. This booklet is your Summary Plan Description.

Plan Document - The legal document according to which the Fund administers the Plan. Your Local Union has a copy of the Plan Document for you to look at or you can request your own copy from the Member Service Department, P.O. Box 5044, Des Plaines, Illinois 60016. The Fund must charge you 25¢ per page for your own copy of the Plan Document.

Central States, Southeast and Southwest Areas Pension Fund

Summary Plan Description and Pension Plan

Effective July 1, 1980

(c) Your Rights Under the Employee Retirement Income Security Act of 1974 (ERISA)

As a Participant of the Central States, Southeast and Southwest Areas Pension Plan, you and other Plan Participants are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974. ERISA provides that, as a Plan Participant, you are entitled to:

— Receive a summary of the annual financial report of the Plan once a year. As modifications to the Plan are made, you will be notified.

— Examine, without charge, at the Pension Fund office and at other locations (such as Local Union halls) all Plan documents, contracts, collective bargaining agreements and copies of all documents filed by the Plan with the U.S. Department of Labor, such as annual reports and Plan descriptions.

— Obtain copies of all Plan documents and other Plan information upon written request to the Trustees. The Trustees may make a reasonable charge for the copies.

— Obtain once a year starting in 1978, a statement of your accrued pension benefits and your nonforfeitable (vested) pension benefits (if any) or the earliest date on which benefits will become nonforfeitable (vested). The Plan may require a written request for this statement, but it must provide the statement free of charge.

— File suit in a federal court, if any materials requested are not received within 30 days of your request, unless the materials were not sent because of matters beyond the control of the Trustees. The court may require the Trustees to pay a penalty of up to $100 for each day's delay until the materials are received.

The Trustees of this Plan also will tell you, upon written request, whether a specific Employer or Local Union is required to make contributions to this Plan. You may

examine a complete list of all contributing Employers, as well as other documents at the Pension Fund office. The address is given on page 37.

In addition to creating rights for Plan Participants, ERISA imposes obligations upon the persons who are responsible for the operation of the employee benefit plans. These persons are called "fiduciaries" in the law. Fiduciaries must act solely in the interest of the Plan Participants and they must exercise prudence in the performance of their Plan duties. Fiduciaries who violate ERISA may be removed and required to make good any losses they have caused the Plan.

Your Employer may not fire you or discriminate against you to prevent you from obtaining a pension benefit or exercising your rights under ERISA.

If your claim for a pension benefit is denied in whole or in part, you must receive a written explanation of the reason for the denial. You have the right to have the Plan review and reconsider your claim (see "Filing an Appeal If a Claim Is Denied" on page 30).

If you are improperly denied a pension benefit in full or in part, you have a right to file suit in federal or state court and to have legal process served upon a Plan fiduciary (see page 38). If Plan fiduciaries are misusing the Plan's money, you have a right to file suit in a federal court or request assistance from the U.S. Department of Labor. If you are successful in your lawsuit, the court may, if it so decides, require the other party to pay your legal costs, including attorney's fees.

If you have any questions about this statement or your rights under ERISA, you should contact the Trustees or the nearest Area Office of the U.S. Labor-Management Service Administration, Department of Labor.

MORE INFORMATION ABOUT THE PLAN

If for any reason you wish to contact the Plan, you may do so by writing

Central States, Southeast and Southwest Areas
Pension Fund
8550 West Bryn Mawr Avenue
Chicago, Illinois 60631

Telephone: (312) 693-5300

If you wish to take legal action against the Plan, you may have legal process served on the Executive Director or any of the Plan Trustees. The name and address of the agent for service of legal process is:

Executive Director
Central States, Southeast and Southwest Areas
Pension Plan
8550 West Bryn Mawr Avenue
Chicago, Illinois 60631

Central States, Southeast and Southwest Areas Pension Plan is a defined benefit plan administered by a Board of Trustees that makes all rules necessary to administer this Plan on behalf of its Participants. There are 8 Trustees on the Board of Trustees; 4 Trustees representing the Union; and 4 Trustees representing Employers.

For purposes of administering the Plan, records are kept on a calendar year basis. The Plan year and the fiscal year run from January 1 through December 31.

The Employer Identification Number (EIN) assigned to the Plan by Internal Revenue Service is 36-6514764. The Plan number assigned by Internal Revenue Service is 001.

Central States, Southeast and Southwest Areas Pension Plan

Effective January 1, 1976

As Amended to Date

Appendix A

ARTICLE I. DEFINITIONS

Section 1.01: Pension Plan or **Plan,** as used, herein, shall refer to the employee retirement benefit plan as described herein or as from time to time hereafter amended.

Section 1.02: Trust Agreement, as used herein, shall refer to the Agreement and Declaration of Trust made and entered into the sixteenth day of March, 1955, and as amended from time to time thereafter, by and between Central Conference of Teamsters, Southern Conference of Teamsters, and their affiliated Local Unions, and the Southeastern Area Motor Carriers Labor Relations Association; Southwest Operators Association; Motor Carriers Employers Conference-Central States; Cartage Employers Management Association; Cleveland Draymen Association, Inc.; and Northern Ohio Motor Truck Association, Inc.

Section 1.03: Trust Tund or Pension Fund, as used herein, shall refer to all property of whatever nature which shall be in the Trust created by the Trust Agreement.

Section 1.04: Employer, as used herein, shall mean any Employer who is now, or shall in the future be, bound by a Collective Bargaining Agreement, as hereinafter defined, with the Union, agrees to be bound by the Trust Agreement, satisfies the requirements for participation as established by the Trustees, and is formally accepted for such participation by the Trustees. An Employer shall cease such participation upon determination by the Trustees that said Employer has failed to comply with any of these conditions or any such other conditions or requirements as may be set forth in the Trust Agreement or promulgated pursuant thereto.

Section 1.05: Union, as used herein, shall mean the Central Conference of Teamsters, the Southern Conference of Teamsters, and their affected affiliated local unions, and such other unions as the Trustees may agree upon.

Section 1.06: Employee, as used herein, shall mean:

(a) A person (other than a person employed in a supervisory capacity) who has been on the payroll of an Employer for at least 30 days who is employed under the terms and conditions of a Collective Bargaining Agreement, as hereinafter defined, entered into between an Employer, as herein defined, and a Union, as herein defined, and on whose behalf contributions are made or are presently required to be made to the Pension Fund by the Employer; or

(b) All persons employed by the Union, as herein defined, upon being proposed by the Union and after acceptance by the Trustees, as hereinafter defined, and as to such Union personnel the Union shall be considered an Employer, solely for the purpose of contributions, within the meaning of the Agreement and Declaration of Trust and shall, on behalf of such personnel, make or be presently required to make contributions to the Pension Fund at the times and at the rate of payment equal to that required by any other Employer who is party to the Trust Fund for the same benefits; or

(c) All persons employed by Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees, as hereinafter defined; and as to such personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of the Agreement and Declaration of Trust and shall, on behalf of such personnel, make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust Fund for the same benefits.

(d) Effective July 1, 1973, all persons who are Trustees of Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest

Areas Health and Welfare Fund upon acceptance by the Trustees, as hereinafter defined; and on behalf of such persons who are Trustees, their Employers shall make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust for the same benefits.

(e) In all instances the common law test, or the applicable statutory definition of master-servant relationship shall control employee status.

(f) The continuation of employee status once established shall be subject to such reasonable rules as the Trustees may adopt according to law.

Section 1.07: Trustees, as used herein, shall mean the Trustees designated in the Trust Agreement together with their successors designated and appointed in accordance with the terms of the Trust Agreement.

Section 1.08: Employer Contributions, as used herein, shall mean contributions made or required to be made by Employers to the Trust Fund.

Section 1.09: Collective Bargaining Agreement, as used herein, shall mean an agreement to which any Union, as defined herein, is a party with an Employer, as defined herein.

* * *

Section 1.17: Bargaining Unit, as used herein, shall mean that group of Employees (as defined in Section 1.06) which is employed by an Employer (as defined in Section 1.04) under the terms and conditions set forth in a Collective Bargaining Agreement (as defined in Section 1.09) to which that Employer and any Union (as defined in Section 1.05) are parties.

* * *

Appendix A

ARTICLE III. PARTICIPATION AND ELIGIBLITY FOR PENSION AND OTHER BENEFITS

* * *

Section 3.02: Covered Employment.

(a) Any employment of an Employee for which contributions to the Pension Fund are made or are required to be made on his behalf shall be considered Covered Employment if such contributions are in accordance with the rules and regulations of this Plan and Trust Agreement.

(b) Service in the Armed Forces of the United States under Selective Service or during a war or international police action (if such service was entered directly from Covered Employment and if the the Employee returned directly from such service to Covered Employment) shall be considered Covered Employment.

(c) Any employment prior to the date an Employee first became a Participant of this Plan shall be considered Covered Employment if such employment meets one of the conditions as follows:

(1) Employment within a classification of work and in an industry which was at the time of such employment normally covered by Teamster Collective Bargaining Agreements in the same local metropolitan area; and or

(2) Continuous past employment with an Employer in a classification of work prior to the date such Employer became a contributing Employer to the Pension Fund. if the Employee was employed by such Employer in the same classification of work on the date such Employer became a contributing Employer to the Pension Fund; and or

(3) Employment requiring the usual Teamster skills in the traditional Teamster Industry at the time of such employment; and/or

(4) Employment which was covered by Teamster Collective Bargaining Agreements with his Employer at the time of such employment.

(d) Any employment after the date an Employee first became a Participant in this Plan, which meets the following condition shall be considered Covered Employment:

Continuous past employment with an Employer in a classification of work prior to the date such Employer became a contributing Employer to the Pension Fund, if the Employee was employed by such Employer in the same classification of work on the date such Employer became a contributing Employer to the Pension Fund.

(e) Employment by a Union as provided for in this Plan, shall be considered Covered Employment.

(f) Under no circumstances (other than the calculation of Vesting Service Week (as defined in Section 3.04(b)(2)) and solely for the purpose of becoming a Vested Participant) shall any employment by a Participant as a supervisor or in any position excluded from a Bargaining Unit which was or later became subject to a Collective Bargaining Agreement be considered Covered Employment or Credited Service for purposes of this Pension Plan.

(g) Any Participant who is a member of a Bargaining Unit (as defined in Section 1.17) which withdraws from the Pension Fund or otherwise ceases participation in Covered Employment shall lose and be denied all right and claim to any benefit other than whatever benefit which he may be entitled to receive as a result of contributions made or required to be made to the

Pension Fund on his behalf upon his sustaining a One-Year Break in Service (as defined in Section 3.05(c)) after the date of such withdrawal or the cessation of Covered Employment by his Bargaining Unit.

* * *

ARTICLE VII. CONTRIBUTIONS AND FUNDING OF PENSION AND OTHER BENEFITS

Section 7.01: Amount of Contributions. Each Employer shall make continuing and prompt payments to the Trust Fund on behalf of each Employee in its Bargaining Unit as required by the applicable Collective Bargaining Agreement. The obligation to make such contributions shall continue during periods when the Collective Bargaining Agreement is being negotiated, but such contributions shall not be required in the case of a strike after termination of such Collective Bargaining Agreement, unless the parties to such Collective Bargaining Agreement mutually agree otherwise. All Contribution Classes in this Pension Plan are determined by the amount of the weekly contribution paid on behalf of Participants in a Bargaining Unit (as defined in Section 1.17). No contribution will be permitted or accepted on any basis other than full weeks of payments, notwithstanding any Collective Bargaining Agreement to the contrary; any contribution made in an amount not consistent with the Contribution Classes set forth in this Pension Plan shall be considered as if made at the next lower Contribution Class level set forth in this Pension Plan.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,

Plaintiffs,

Case No. 80-71872
Hon. Anna Diggs Taylor

vs.

CENTRAL TRANSPORT, INC., et al.

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NOW COME the above-named Plaintiffs, by and through their attorneys, Russell N. Luplow, P.C., and, pursuant to Rule 65 of the Federal Rules of Civil Procedure, move this Honorable Court for the entry of an Order directing Defendants to show cause, if there by [sic] any, why a preliminary injunction should not issue enjoining Defendants, their officers, agents, servants, employees, attorneys, accountants, and those persons in active concert or participation with them from disposing of, destroying, mutilating, defacing, altering, confusing, or in any way changing the existence, identity, format, or location of all pertinent records, inclusive of those listed below, relating to Defendants' past, present, and future employees; and for the entry of such injunction. Plaintiffs state to the Court as follows:

1. Plaintiffs, multiemployer benefit plans within the meaning of the Employee Retirement Income Security Act of 1974 (29 USC 1001 *et seq.*, hereinafter referred to as "ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (PL 96-364, hereinafter referred to

as the "MEPPAA"), commenced an action against Defendants in May, 1980, on behalf of their Trustees, as well as the participants in and beneficiaries of the Pension and Health and Welfare Plans, in order to collect delinquent contributions owing to the two Funds pursuant to certain collective bargaining agreements, and to compel Defendants to produce pertinent employment-related records for the purposes of an audit as required by Article III, Section 5 of the Trust Agreement governing each Fund.

2. On August 25, 1980, Defendants, various corporations engaged in or supportive of the transportation of goods in interstate commerce, collectively styled as "Central Transport," filed a Motion to Dismiss Plaintiffs' Complaint. Defendants argued that Plaintiffs had neither a contractual nor a statutory right to examine the payroll data of all of their employees without a prior determination by the employer and union that particular employees were "covered" by the collective bargaining agreement. Defendants argued that the confidentiality of the records of "non-covered" employees precluded their disclosure for audit purposes.

3. In order to limit the scope of the audit, Defendants asserted that 60% of their employees were not covered by collective bargaining agreements with the union (various locals affiliated with the International Brotherhood of Teamsters).

4. In September, 1980, Plaintiffs responded to Defendants' Motion to Dismiss and also filed a Motion for Partial Summary Judgment or, in the Alternative, for a Preliminary Injunction to require Defendants to produce pertinent records for all their employees and to submit to the audit as requested by the Fund Trustees.

5. It was and remains Plaintiffs' basic position that the right to determine the scope of an audit and to conduct it lies within the exclusive powers of the Funds' Trustees,

being a matter of ordinary trust administration as contemplated by common law and as codified by ERISA.

6. Plaintiffs have consistently maintained that without such an independent audit, their Trustees would be unable to insure the financial integrity of the funds and to fulfill their fiduciary obligations to the respective Plans' participants and beneficiaries.

7. Article III, Section 5, of each Trust Agreement ("Production of Records") provides: "The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust."

8. Defendants do not deny having been a party to the National Master Freight Agreement ("collective bargaining agreement") for the years relevant to this litigation.

9. Articles 60 and 61 of the collective bargaining agreement incorporate the Trust Agreements by reference. By executing the collective bargaining agreement, a signatory employer ratifies all acts taken or to be taken by the Boards of Trustees.

10. A hearing was held on October 20, 1980, at which the parties agreed to have their respective pleadings treated as Cross-Motions for Summary Judgment, it having been admitted by both sides that no question of material fact existed with respect to the scope of audit issue.

11. The question of law decided by the Court was whether or not the Trustees of the Funds had a contractual and statutory right to demand the production of pertinent employment-related records for all of Central Transport's employees for the purposes of an audit.

12. On October 19, 1981, the District Court issued a Memorandum Opinion and Order in which it found, *inter alia*, that Plaintiffs had a contractual and statutory right to examine the pertinent records of all employees employed by Central Transport regardless of whether Central Transport itself considered them to be covered by the collective bargaining agreement. The Court also determined that Plaintiffs' interest in conducting an independent audit to verify the accuracy of Defendants' reporting outweighed Defendants' interest in protecting the confidentiality of the records of non-unit employees, since a pattern of underreporting had already been established based on a prior and incomplete audit and since Plaintiffs gave specific assurances to protect the confidentiality of the records requested.

13. The District Court ordered Defendants to produce the records requested and to allow Plaintiffs to continue the audit begun earlier.

14. Defendants filed a Motion for Amendment of the Order and for Certification of the issues for appeal pursuant to 28 USC 1292(b). A hearing was held and the District Court denied Defendants' Motion on November 16, 1981, on the grounds that Defendants did not meet the three (3) tests required before a court will certify its orders for an interlocutory appeal.

15. Defendants filed a Notice of Appeal to the Court of Appeals for the Sixth Circuit, characterizing the Orders of the District Court as an "injunction," thus invoking 28 USC 1292(a)(1) of the interlocutory decisions statute.

16. On or about January 18, 1982, Plaintiffs filed with the Court of Appeals a Motion to Dismiss the Appeal, on the grounds that the District Court's Orders were neither a final order nor an interlocutory injunction, and therefore not valid appealable orders either under 28 USC 1291 or 28 USC 1292(a)(1).

17. On January 6, 1982, Plaintiffs' counsel wrote to Defendants' counsel requesting resumption of the audit in compliance with the Court's Orders. Defendant refused to permit resumption of the audit and so advised Plaintiffs' counsel by correspondence of January 8, 1982. The audit has not been commenced. (Exh. A)

18. On or about January 13, 1982, Defendants filed a Motion to Stay Preliminary Injunction pending the Appeal.

19. On or about January 27, 1982, Plaintiffs filed a response. Plaintiffs argued that a stay would be unwarranted since no valid appeal lies and since Plaintiffs' Motion to Dismiss will in call probability be granted. The basis of Plaintiffs' argument was that the District Court did not issue an injunction but ordered, by granting Plaintiffs' Motion for a Partial Summary Judgment, the specific enforcement of express contractual obligations. Plaintiffs argued alternatively that even were the Orders to be construed as an injunction, Defendants did not satisfy the four-prong requirement articulated in Rule 62(c) of the Federal Rules of Civil Procedure, which tests must be passed to justify a District Court in issuing a stay of its own orders pending appeal.

20. Plaintiffs, in their response, demonstrated that they would be irreparably harmed by a stay because of the danger that the records requested would be lost or destroyed during the pendency of the appeal. Plaintiffs incorporate and make part hereof their Brief in Response to Defendants' Motion for a Stay.

21. Plaintiffs have been attempting to conduct a complete audit of Defendant companies since the late winter of 1980.

22. When the audit ceased in March, 1980, only 14 of the 16 named Defendants had been subject to an audit, and then only on the basis of incomplete records. Systematic

underreporting as well as discrepancies as to the identity of "covered" employees were established. (Plaintiffs incorporate herein and make part hereof the Affidavit of Juanito Pasia and John P. O'Sullivan.)

23. Plaintiffs are required by ERISA to award benefits and grant service credit to employees covered by the collective bargaining agreement regardless of whether an employer has contributed on their behalf.

24. Plaintiffs' Trustees, as ERISA fiduciaries, are alone responsible for monitoring an employer's contribution obligations and for taking vigorous action to collect delinquent contributions.

25. Plaintiffs designate as "pertinent records" within the meaning of Article III, Section 5, of the Trust Agreements *(supra)*: payroll ledgers, payroll journals, individual earnings cards, time cards, payroll check registers, cancelled payroll checks and cancelled checks used for payment of income reported on IRS 1099 forms, voucher copies of payroll checks, drivers' daily log and trip sheets, payroll manifests, delivery manifests, trip manifests, terminal drafts, cash disbursements journal, freight bills, revenue bills, billing invoices, fuel and mileage reports, drivers' settlement statements, seniority lists, dues check-off lists, IRS Forms 941 and 941C, IRS Forms W-2, W-3 and W-4, IRS Forms 1099, employer's monthly and quarterly state unemployment compensation tax and wage reports, annual reports to the Interstate Commerce Commission, Department of Labor statistical log and summary of occupational injuries and illness, personnel, files, attendance records, accounting records for distribution of payroll costs, payroll account reconciliations, workman's compensation records, notices of employee separation, monthly reports to any employee benefit plan, computer files including magnetic data base and printed reports containing above information, and corporate tax returns.

26. On December 15, 1981, Plaintiffs attempted to obtain a stipulation from Defendants for the entry of an Order, and for a preliminary injunction restraining Defendants (and/or its officers, agents, employees, attorneys et al) from destroying or defacing the above-itemized records pending final resolution of the issue of Plaintiffs' right to conduct a complete audit. (Exh. B)

27. Defendants have refused to stipulate to the entry of such an Order and have not otherwise guaranteed the later availability of these records. (Exh. C)

28. Without these records, it will be difficult for Plaintiffs to verify the accuracy of Defendants' reporting and to determine whether delinquencies exist. Nevertheless, Plaintiffs will be liable to any employee who can prove that he performed bargaining unit work for the requisite period of time pursuant to a collective bargaining agreement executed by Defendants. This situation would undermine Plaintiffs' actuarial solvency and cause irreparable harm.

29. A preliminary injunction restraining Defendants and their agents from taking any action to threaten the later availability of the above-itemized records is necessary to preserve and maintain the status quo (eg. the present form and location of these records) until such time as the issue of Plaintiffs' right to conduct a complete audit is decided in favor of Plaintiffs and, in that event, until such time as the audit is conducted and completed.

30. This Motion is based upon the pleadings heretofore filed with this Court, including all Briefs in support of and in response to earlier Motions, together with all attached Affidavits, Plaintiffs' Motion to Dismiss the Appeal and supporting Brief, correspondence attached hereto as Exhibits A through C, and Plaintiffs' Brief in Support of this Motion.

WHEREFORE, Plaintiffs, Central States, Southeast and Southwest Areas Pension and Health & Welfare Funds, request this Honorable Court to enter an Order for a preliminary injunction enjoining Defendants, their officers, agents, servants, employees, attorneys, accountants, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, from disposing of, destroying, mutilating, defacing, altering, confusing, or in any way changing the existence, identity, format, or location of the pertinent records, itemized above, relating to the past, present, and future employees of Central Transport, pending final resolution by this Court or the Court of Appeals of Plaintiffs' right to conduct a complete audit and, if such issue be decided in favor of Plaintiffs, pending the conduct and completion of such audit.

LAW OFFICES OF RUSSELL N. LUPLOW, P.C.
Attorneys for Plaintiffs
505 Woodward, Suite 3400
Bloomfield Hills, MI 48013
644-8666

(s) Russell N. Luplow
(s) Diana L.S. Peters

Of Counsel:
(s) Charles J. Taunt

Dated: January 26, 1982

APPENDIX C

NATIONAL MASTER FREIGHT AGREEMENT

Covering

OVER-THE-ROAD

and

LOCAL CARTAGE

EMPLOYEES OF PRIVATE,

COMMON, CONTRACT AND

LOCAL CARTAGE CARRIERS

For the Period of

MARCH 1, 1982

through

MARCH 31, 1985

* * *

Section 3.

Check-Off

The Employer agrees to deduct from the pay of all employees covered by this Agreement the dues, initiation fees and/or uniform assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions prior to the end of the month for which the deduction is made. Where laws require written authorization by the employee, the same is to be furnished in the form required. The Local Union shall certify to the Employer in writing each month a list of its members working for the Employer who have furnished to the Employer the required authorization, together with an itemized statement of dues, initiation fees (full or installment), or uniform assessments owed and to be deducted for such month from the pay of such member, and the Employer shall deduct such amount from the first paycheck following receipt of statement of certification of the member and remit to the Local Union in one lump sum. The Employer shall add to the list submitted by the Local Union the names of all regular new employees hired since the last list was submitted and delete the names of employees who are no longer employed. Check-off shall be on a monthly or quarterly basis at the option of the Union.

When an Employer actually makes a deduction for dues, initiation fees and assessments, in accordance with the statement received from an appropriate Local Union, he shall remit same no later than thirty (30) days from the date such deduction was made and in the event he fails to do so, he shall be assessed ten percent (10%) liquidated damages.

Where an employee who is on check-off is not on the payroll during the week in which the deduction is to be made, or has no earnings or insufficient earnings during that week, or is on leave of absence, the employee must make arrangements with the Local Union and/or the Employer to pay such dues in advance.

The Employer will recognize authorization for deductions from wages, if in compliance with state law, to be transmitted to the Local Union or to such other organizations as the Union may request if mutually agreed to, except DRIVE deductions which shall be made annually. No such authorization shall be recognized if in violation of state or federal law. No deduction shall be made which is prohibited by applicable law.

In the event that an Employer has been determined to be in violation of this Article by the decision of an appropriate grievance committee, and if such Employer subsequently is in violation thereof after receipt of seventy-two (72) hours written notice of specific delinquencies, the Local Union may strike to enforce this Article. However, such strike shall be terminated upon the delivery thereof. Errors or inadvertent omissions relating to individual employees shall not constitute a violation.

* * *

ARTICLE 61.

HEALTH AND WELFARE BENEFITS

Effective March 1, 1982, the Employer shall contribute to a fund, which is to be administered jointly by the parties, the sum of $39.50 per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more and effective April 1, 1982, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST AND

SOUTHWEST AREAS HEALTH AND WELFARE FUND or other applicable fund the sum of $45.50 per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more. There shall be no other increase in the Employer contribution during the term of this Agreement except those amounts which are allocated by the Joint National Master Committee from the cost-of-living adjustment provided by Article 33. Such allocation shall be uniform in amount, and to the extent possible, in the sole discretion of the Joint National Master Committee, such uniform amount shall provide for the maintenance of Health and Welfare benefits in effect on January 1, 1982. If the allocation of the entire amount of the cost-of-living adjustment provided by Article 33 is less than the uniform amount so determined, the Employer contribution will be increased to the uniform amount determined by the Joint National Master Committee.

The Joint National Master Committee shall determine the form and nature of the information to be submitted by the respective Health and Welfare Funds, which information shall be submitted to the Joint National Master Committee 90 days prior to April 1, 1983 and April 1, 1984 and March 31, 1985.

By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties hereto to enter into appropriate trust agreements necessary for the administration of such Fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks.

If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an em-

ployee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Health and Welfare Fund during the period of absence.

There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Health and Welfare Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-operator compensation.

Disputes or questions of interpretation concerning the requirement to make contributions on behalf of particular employees or classifications of employees shall be submitted directly to the Conference Joint Area Committee by either the Employer, the Local Union or the Trustees. In the event of such referral, the Employer shall not be deemed to be delinquent, while the matter is being considered, but if the Conference Joint Area Committee, by majority vote, determines that contributions are required, the Employer shall pay to the Trust Fund the amounts due together with any other charges uniformly applicable to past due contributions. The Conference Joint Area Committee may also determine whether the Employer's claim was bona fide.

Contributions to the Health and Welfare Fund must be made for each week on each regular employee, even though such employee may work only part-time under the provisions of this Agreement, including weeks where work is performed for the Employer but not under the provisions of this Agreement, and although contributions may be made for those weeks into some other Health and Welfare fund.

Contributions shall be made for any regular employee on layoff who is worked one (1) day in any week for any reason.

If any employee on the seniority list is worked a day in any work week either as a replacement or supplemental employee, the Employer shall pay the full weekly contribution for that work week. In addition, any active employee on the

seniority list and available for work, the Employer shall pay the full weekly contributions for that work week.

Employers presently making payments to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND, and Employers who may subsequently begin to make payments to such fund, shall continue to make such payments for the life of this Agreement. Action on delinquent contributions may be instituted by either the Local Union, the Area Conference, or the Trustees. Employers who are delinquent must also pay all attorneys' fees and costs of collection.

ARTICLE 62.

PENSIONS

Effective March 1, 1982, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND the sum of Fifty-One dollars ($51.00) per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more. Effective April 1, 1982, the weekly contributions shall be increased to Fifty-Five dollars ($55.00).

This fund shall be the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND. There shall be no other pension fund under this Agreement for operations under this Agreement or for operations under the Southern Conference Area Agreements to which Employers who are party to this Agreement are also parties.

By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties hereto to enter into appropriate trust agreements necessary for the administration of such Fund, and to designate the Employer Trustees under such agreement, hereby waiving all

notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months.

If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

Disputes or questions of interpretation concerning the requirement to make contributions on behalf of particular employees or classifications of employees shall be submitted directly to the Conference Joint Area Committee by either the Employer, the Local Union or the Trustees. In the event of such referral, the Employer shall not be deemed to be delinquent, while the matter is being considered, but if the Conference Joint Area Committee, by majority vote, determines that contributions are required, the Employer shall pay to the Trust Fund the amounts due together with any other charges uniformly applicable to past due contributions. The Conference Joint Area Committee may also determine whether the Employer's claim was bona fide.

There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Pension Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-operator compensation.

Contributions to the Pension Fund must be made for each week on each regular employee, even though such employee may work only part-time under the provisions of this Agreement, including weeks where work is performed for

the Employer but not under the provisions of this Agreement, and although contributions may be made for those weeks into some other pension fund. Contributions shall be made for any regular Employee on layoff who is worked one (1) day in any week for any reason.

If any employee on the seniority list is worked a day in any work week either as a replacement or supplemental employee, the Employer shall pay the full weekly contribution for that work week. In addition, any active employee on the seniority list and available for work, the Employer shall pay the full weekly contributions for that work week.

Effective March 1, 1982, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST, AND SOUTHWEST AREAS PENSION FUND the sum of eight dollars ($8.00) for each tour of duty worked by each casual and/or probationary employee, until such time as such employee accrues seniority in accordance with the contract.

Effective April 1, 1982, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND the sum of $8.00 for each tour of duty worked by each casual employee until such time as such employee accrues seniority in accordance with the contract. This shall not apply to a bona fide probationary employee who is notified in writing, with a copy to the Local Union, at the beginning of his employment that he is a probationary employee. However, if such probationary employee does not accomplish seniority under the provisions of the contract, but is terminated during the probationary period, the Employer must give written notice of such termination to the Local Union and he must then comply with the contract provisions for pension payments for each day of employment as if he were an extra employee. Any violation of this provision shall be subject to the grievance procedure.

Action for delinquent contributions may be instituted by either the Local Union, the Area Conference or the Trustees. Employers who are delinquent must also pay all attorneys' fees and costs of collection.

* * *

APPENDIX D

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

Appendix D
(Emphasis Added)

EXHIBIT F

REPORT OF CERTIFIED PUBLIC ACCOUNTANTS

The Trustees
Central States, Southeast and
Southwest Areas Pension Fund

We have examined the accompanying statement of net assets available for benefits of Central States, Southeast and Southwest Areas Pension Fund ("Fund") at December 31, 1982 and 1981, and the related statement of changes in net assets available for benefits for the years then ended. *Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.* Securities owned by the Fund at December 31, 1982 and 1981 were confirmed to us by the custodians.

In our opinion, the statements mentioned above present fairly the net assets available for benefits of the Fund at December 31, 1982 and 1981, and the changes in net assets available for benefits for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis during the period.

Our examinations were made for the purpose of forming an opinion on the basic financial statements taken as a whole. The supplementary information appearing in Exhibits G through Q and in Items 13 and 14 of the accompanying Form 5500 is presented for purposes of additional analysis and is not a required part of the basic financial statements. This information has been subjected to the auditing procedures applied in the examination of the basic financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.

(s) ARTHUR YOUNG & COMPANY

Chicago, Illinois
March 30, 1983

APPENDIX E

[Letterhead of Central States Southeast and Southwest Areas Health and Welfare and Pension Funds]

April 5, 1984

Robert S. Brown, Esq.
Brown, Cummins & Brown Co., LPA
Six East Fourth Street
Cincinnati, Ohio 45202

RE: THE VICTOR TRANSIT CO.

Dear Mr. Brown:

I am writing as a follow-up to our conversation April 4, 1984 and your letter of March 21, 1984. As stated in our engagement letter sent to Mr. William Dally of Victor Transit Corp., the proposed audit will cover the period December 28, 1980 through December 21, 1983. This is the standard scope of audits performed by the Funds. It should be pointed out though that if there is evidence of significant overreporting or underreporting documented during the audit, the audit scope is expanded to cover all periods not barred by the Statute of Limitations.

Attached for your information are excerpts from the Board of Trustees agenda which includes the recommendation for the audit department. Also attached for your information is an excerpt from the 1982 Institute on Collection of Employer Contributions which discusses the Funds' Fiduciary responsibility to perform audits.

I hope this information satisfies your requests. Someone from my department will be contacting you in the near future to determine the schedule for an audit.

If you have any questions, please do not hesitate to call me at 800-323-2152, extension 443.

Very truly yours,

(s) Albert E. Nelson
Director
Field Audit Group

AEN:aw

cc: Robert M. Warner, Finance Director

Appendix E

THE PAYROLL AUDIT PROGRAM

by Michael J. Carroll and Harvey Frank, CPA

THE FIDUCIARY DUTY TO AUDIT

Let us begin with the statement of a very obvious principle: Trustees have a fiduciary obligation to take every reasonable step possible to collect all contributions due the trust.

In theory it may be possible to perform this legal duty without an auditing program. If you represent a very small trust with highly specialized participants, or if the geographical area is small enough that all employer activity takes place under your watchful gaze, audits might not be crucial to your collection program.

Virtually all multiemployer plans involve too many potential participants, too many employers and too large an area for trustees to personally check every timecard. There is no way to collect all contributions due the trust without an audit program. There is no way to even guess what your unfunded liability is without an audit program.

Mr. Carroll is a member attorney with the San Francisco law firm, Erskine & Tulley, a professional corporation, and during the past eight years he has specialized in the collection of delinquent employer contributions for the trucking, construction and printing industries, among many others. He earned his B.A. and J.D. degrees at the University of San Francisco. Mr. Carroll has spoken before other professional organizations, including previous Foundation educational meetings.

[PHOTO]

Mr. Frank is partner-in-charge of multiemployer trust fund audits for the Detroit office of Fox & Company. A member of the American Institute of Certified Public Accountants, he served on the Behavioral Standards Subcommittee of the Ethics Committee. Additionally, he was chairman of the Ethics Committee of the Michigan Association of CPAs. Mr. Frank received A.B. and M.B.A. degrees from the University of Michigan at Ann Arbor and is a member of the International Foundation's Accountants Committee. He has participated in previous Foundation educational programs.

[PHOTO]

Appendix E

The role of the audit in fulfilling the trustee's legal duty to collect all contributions is highlighted by the court in *Central States Pension Fund v. Central Transport*, 522 F. Supp. 658, 2 EBC 1844 (D.C.Mich. 1981). Central Transport argued that it had no statutory or contractual duty to open its books to the trust. Also, the company argued that it had an obligation to protect the confidentiality of its employee records.

The court granted partial summary judgment for the trust, acknowledging that without an independent audit the trust is unable to fulfill its fiduciary obligations to the participants in, and beneficiaries of, the benefit plans. The court did find that a contract obligation to allow the audit existed. But, in addition to the contract basis, the court emphasized that a separate, statutory ground for the audit could be found in ERISA. ERISA imposes on trustees the obligation to discharge their duties with the care, skill, prudence and diligence of a prudent man. Since the trustees, in carrying out their duties to preserve and maintain the assets, believed that an audit was necessary, the court found that ERISA mandated that Central Transport must open its books to examination.

A critical analysis of the court's reasoning, in my view, makes ERISA's mandate a two way street. Not only must Central Transport allow an audit, but the Central States trustees must have an auditing program.

In this case the auditors were allowed in, but Central Transport only provided the records of employees the company believed were covered by the contract. The company contended that 60% of its people did uncovered work. The auditors asked for all employee records. Before they were kicked out, the auditors had seen enough to conclude that at the very least Central Transport had underreported by $172,303.50.

How many employers contributing to your trust believe erroneously that 60% of their people do uncovered work?

How many employers in your trust owe an additional $172,303.50 in contributions? You will not know until you audit. But if you never audit, you will never know.

Trustees must keep in mind that the Labor Department-IRS exemption from the prohibited transaction section says:

> Plans which do not establish and implement collection procedures which are reasonable, diligent and systematic may be engaging in prohibited transactions in failing to collect delinquent contributions.
>
> Prohibited Transaction Exemption
> 76-1, 41 *Fed. Reg.* 12741
> (March 26, 1976)

A Collection procedure that fails to include an auditing program is not reasonable, diligent or prudent. This is not to say that you must set aside substantial trust assets for an auditing program to perform your fiduciary duties. Audit fees and other costs should be borne by the employer whenever the audit shows he has failed in some substantial way to pay voluntarily all he owes.

THE LEGAL BASIS FOR THE AUDIT

Trust funds have a common-law right to an accounting by employers of the contributions due and owing to the trust. ERISA Section 209(a) requires every employer to maintain records sufficient to determine the benefits due or those that may become due to its employees. These common-law and statutory obligations are not sufficient to afford an auditor unfettered access to all the records he may require.

The collective bargaining agreement or the trust agreement should create the right to audit and set forth the employer duty to produce all necessary books and records on demand. There are pros and cons to the use of each document for this purpose. When the obligation is in the collective bargaining agreement, the employer is put on

notice from the outset that he might someday be audited. This notice may act as a deterrent. On the other hand, the bargaining parties may not want to make this provision, especially if it is long. Or worse, they might want to change the wording or bargain over the clause, which is not appropriate in most cases. The trustees, wearing their hats as trustees, as opposed to labor and management, should have a clause that fills their needs as fiduciaries. The trust document is the appropriate place for audit language, especially if the trustees go to some pains to remind employers of the audit provisions through other devices.

In the Appendix are four sample provisions that provide for the right to audit. Each has evolved to meet the needs of trust funds in different industries. Some industries, by their very nature, are more difficult to audit and greater specificity in the audit language is required to ensure an accurate result. Compare each of these clauses to your trust agreement or collective bargaining contract and incorporate any new language that solves problems encountered by your trust.

Sometimes, even with language that appears adequate on the surface, a trust will have difficulty getting a complete audit. In *Central States Pension Fund v. CRST, Inc.*, 641 F.2d 616, 104 LRRM 3096, 2 EBC 1151 (8th Cir. 1981), the auditor wanted access to the employment and earnings records of all CRST employees, including employees who may not be covered by the collective bargaining agreement. The language was very similar to Example Two in the Appendix.

The court defined the word "employee" as "covered employee" in a very narrow reading of the trust agreement. It even took the phrase "and such other information as the Trustees may reasonably require" and by interpretation added the phrase "about covered employees." The court suggested, as an alternative, vigilance by the union, including review of seniority lists and billing statements and use of the grievance procedure when it believes "covered employees" is being too narrowly construed by the

employer. If the trustees, as opposed to the union, think that the employer isn't paying on all covered employees, a footnote suggests that the Secretary of Labor has the power to investigate and to reveal the results of the investigation to the trust fund.

The CRST decision shows a complete lack of understanding by that court of the crucial role audits play in ensuring employer compliance with its bargained-for obligations. The lesson is to leave no doubt whatsoever about the desired scope of the audit.

* * *

APPENDIX F

(Emphasis in Original)

[Letterhead of New York State Teamsters Council
Health & Hospital Fund

New York State Teamsters Conference
Pension & Retirement Fund]

June 3, 1983

Mr. Beryl Schroyer
Quad State Leasing
P.O. Box 80
Warren, Michigan 48090

RE: Employee Payroll Audit

Dear Mr. Schroyer:

Please be reminded, The Employee Retirement Income Security Act, specifically provides that the employer *must provide* the necessary information for the performance of our fiduciary duties. The cases uniformly ho'd that part of the Fund's fiduciary obligation is to audit contributing employers to determine whether the Fund's are receiving all the monies due the Funds.

It is impossible to determine if the Funds have been paid proper contributions if the employer only provides to the Fund Auditor, records of those employees the employer has contributed for.

In other words, an employer who is "cheating" can show the Fund Auditor the employees contributed on and withhold from the Auditor the employees the employer should have contributed on but did not, make the Fund's audit procedures totally ineffective.

For the Fund Auditor to determine whether or not the Funds have received the proper contributions, we require the complete payroll records of Quad State Leasing, anything less is not acceptable.

Appendix F

Should Quad State Leasing not immediatley comply fully with the ERISA requirements, the Funds shall be forced to conclude Quad State Leasing is refusing to be audited and Quad State Leasing's participation in the Funds shall be cancelled, making Quad State Leasing liable for its employees Medical Claims, Death Benefits and Pension Benefits.

We urge you do not allow this to happen.

Sincerely,

(s)Al Sgaglione
Executive Administrator

AS/11
C.R.R.R. #P30 2699344
cc: Ervin Walker, President, Local Union No. 449
Cindy Walters
Helen Clifford, Supervisor, Audit Department
Stephen Yagey, Fund Auditor

Appendix F

[Letterhead of New York State Teamsters Council
Health & Hospital Fund

New York State Teamsters Conference
Pension & Retirement Fund]

June 27, 1983

Mr. Beryl Schroyer
Quad State Leasing
P.O. Box 80
Warren, Michigan 48090

RE: Audit Refusal - Participation Cancellation

Dear Mr. Schroyer:

Since Quad State Leasing, has ignored the Funds letter to your office of June 3, 1983, be advised, effective 12:01 A.M., Friday, July 1, 1983, Quad State Leasing has provoked the cancellation of its participation in the Funds.

Quad State Leasing is in violation of ERISA and the Fund Participation Agreement, specifically, Provisions One, Four and Thirteen.

The employees of Quad State Leasing and Teamsters Local Union No. 449, by copy of this letter are being informed, that Quad State Leasing has refused to make available its employee payroll records for examination by the Funds, in accordance with ERISA requirements and the Fund Participation Agreement requirements, resulting in the cancellation of Fund participation, effective 12:01 A.M., Friday, July 1, 1983. Participation cancellation makes Quad State Leasing liable for its employees Medical Claims, Death Benefits, Pension Benefits, Lump Sum Death Benefits and Legal representation.

This matter shall be referred to the Fund Attorneys for appropriate legal proceedings.

Appendix F

Quad State Leasing can only be considered for reinstatement as a participating employer, whenever the Fund Auditor is furnished the required employer payroll records and the Auditor concludes the examination of Quad State Leasing payroll records for the period June 1978 thru present.

No further contributions can be accepted by the Funds.

It is most unfortunate that Quad State Leasing has caused this interruption of benefit coverage for its employees.

Sincerely,

(s) Al Sgaglione
Executive Administrator

AS/11
C.R.R.R. #P30 2699345
cc: Rocco F. De Perno, Trustee and Chairman
Fund Policy Committee
Ervin Walker, President, Local Union No. 449
Quad State Leasing — Employees
Cindy Walters, Quad State Leasing
Rocco A. De Perno, ESQ., Fund Attorney
Josephine Russo, Assistant Administratrix
Josephine Dontino, Assistant Administratrix
Joseph Marraffa, Director, Data Processing Department
Adele Novak, Senior Supervisor, Bookkeeping Department
Helen Clifford, Supervisor, Audit Department
Pam Wehby, Supervisor, Legal Benefit Fund
Stephen Yagey, Fund Auditor

Appendix F

[Letterhead of Simpson, Moran & Burnett]

July 11, 1983

Mr. Al Sgaglione
Executive Administrator
New York State Teamsters Council Health
& Hospital Fund and
New York State Teamsters Conference Pension
& Retirement Fund
7 Rutger Park
Utica, New York 13501-3096

RE: Quad States Leasing
Participation Cancellation
Our File No. 3488

Dear Mr. Sgaglione:

Quad State Leasing has fully complied with ERISA requirements and the Participation Agreement concerning record disclosure to the Fund. Quad State Leasing has provided the auditors with all records necessary for the Fund to fulfill its fiduciary obligations.

Your June 3, 1983 statement concerning case authority is clearly inaccurate. The cases have not held that the trustees of a benefit fund are entitled to audit records of noncovered employees. In this regard, I cite to you the case of *Central States et al. v. Central Transport, Inc., Quad State Leasing, et al.*, 698 F.2d 802 (6th Cir. 1983).

Your unilateral action, terminating benefits for our employees, is in direct violation of your own fiduciary responsibilities to those employees. If you sincerely felt you were entitled to audit such records, your proper recourse would have been to initiate suit to compel discovery, rather than take action which harms the very people you proclaim to protect. Quad State Leasing has complied in all regards with your audit, but for the unreasonable request to audit records of noncovered employees. Nothing in the Participa-

tion Agreement permits the action you have taken. The Agreement states that the Fund may audit covered employees and in any event nothing therein gives the Fund the right to terminate benefits for failure to permit examination of non-covered employees.

Thus, unless you immediately reinstate, retroactively, benefit coverage for Quad State Leasing's employees, we will initiate suit against the Funds for their wrongful termination of benefit coverage, breach of the Participation Agreement and breach of their fiduciary duties.

Very truly yours,

SIMPSON, MORAN & BURNETT
Patrick A. Moran
and
Vivian B. Perry

VBP5I/cmb

cc: Fred Murad, Esq.
Rocco F. DePerno
Ervin Walker
B. L. Shroyer

Appendix F

[Letterhead of New York State Teamsters Conference Pension & Retirement Fund]

July 12, 1983

Mr. Beryl Schroyer
Quad State Leasing
P.O. Box 80
Warren, Michigan 48090

Dear Mr. Schroyer:

According to our records, your company has ceased making contributions to this Pension Fund in May 1983 on behalf of your employees covered by the Collective Bargaining Agreement and the Standard Fund Participation Agreement.

Therefore, under the Multi Employer Pension Plan Amendments Act of 1980, there may be an Employer Withdrawal Liability.

We are in the process of determining your company's Employer Withdrawal Liability.

As soon as these calculations are completed by the Fund, we will notify you of the monies your company owes this Pension Fund, if any.

Sincerely,

(s) Al Sgaglione
Executive Administrator

AS/lm
cc: Trustees DePerno, Mousseau, Bush, Canzoneri, Nolan, Gundersen and Muller
Teamsters Local Union No. 449
Josephine Dontino, Assistant Administratrix
Sol Tabor, Fund Consultant

Appendix F

[Letterhead of New York State Teamsters Council
Health & Hospital Fund

New York State Teamsters Conference
Pension & Retirement Fund]

July 15, 1983

Quad States
P.O. Box 80
Warren, Mi. 48090

Dear Sir:

We are returning your June 1983 Employer Report Form, company check No. 37874 in the amount of $458.38 for Health and Hospital Fund and company check No. 37875 in the amount of $1,125.19 for Pension and Retirement Fund.

Since your company has not complied with the rules of the Fund by refusing to allow the Fund to check the payroll records of your company, we cannot accept any further contributions until such time as your company agrees to abide by the rules of the Fund.

Sincerely,

(s) Al Sgaglione
Executive Administrator

AS/ll
Encl.
cc: Local No. 449

Appendix F

[Letterhead of New York State Teamsters Conference Pension & Retirement Fund]

July 28, 1983

Mr. Sol Tabor
Fund Consultant
Tolley International Corporation
60 East 42nd Street
Room 721
New York, New York 10165

RE: Quad State Leasing
Local Union No. 449
Employer Withdrawal Liability

Dear Mr. Tabor:

This is to advise that Quad State Leasing, ceased contributing to the Fund.

The last contributions received by the Fund, are attached.

Please prepare the Employer Withdrawal Liability, if any.

Thank you.

Sincerely,

Al Sgaglione
Executive Administrator

AS/lm
encl.
cc: Trustees DePerno, Mousseau, Bush, Canzoneri, Nolan, Gundersen and Muller
Josephine Dontino, Assistant Administratrix
Teamsters Local Union No. 449
Beryl Schroyer, Quad State Leasing

Appendix F

Quad State Leasing Local 449 Eff. 6/78

	N.Y. State	Upstate	Total
1978	$ 9,606.55		$ 9,606.55
1979	$13,310.15	$3,016.15	$16,326.30
1980	$ 9,592.29	$4,920.11	$14,512.40
1981	$ 9,803.96	$7,561.11	$17,365.07
1982	$ 4,961.57	$5,157.90	$10,119.47
1983	$ 2,533.21	$3,318.15	$ 5,851.36

Last Cont 5/83

6/29/83 PT

Appendix F

[Letterhead of New York State Teamsters Conference Pension & Retirement Fund]

December 16, 1983

Mr. Andrew Maloney, Esq.
Maloney, Viviani, Higgins
and Kelly
630 Fifth Avenue
New York, New York 10020

RE: Quad State Leasing
Employer Withdrawal Liability

Dear Mr. Maloney:

In accordance with the provisions of the Multiemployer Pension Plan Amendments Act of 1980, the actuary for the Fund has calculated the Employer Withdrawal Liability (EWL) for the above named company and determined the Employer Withdrawal Liability to be, $18,019.00.

Also, pursuant to the payment schedule adopted by the Board of Trustees, the above named company was notified by the Fund that it was required to submit a monthly payment in the amount of $915.99, with the first payment due the Fund within sixty (60) days from the date of the letter to the company, informing the company of this payment.

More than sixty (60) days has elapsed since notification by the Fund to the company, without the required remittance from the company.

Your office is authorized to institute the appropriate legal proceedings against the above named company, to immediately compel payment to the Fund of the company Employer Withdrawal Liability, plus interest.

The rules adopted by the Board of Trustees provide that the Fund can request payment in full of the Employer

Withdrawal Liability whenever, an employer does not abide by the payment schedule, the Fund in this case, did inform the company of the rules.

We are enclosing a copy of the letter sent to the above named company, notifying the company of the total Employer Withdrawal Liability and the monthly schedule of payment requirement.

If you require any additional information in this regard, please do not hesitate to contact me.

Sincerely,

Al Sgaglione
Executive Administrator

AS/ll
Encl.
cc: Trustees De Perno, Mousseau, Bush, Canzoneri, Nolan, Gundersen and Muller
Rocco A. De Perno, Esq., Fund Attorney
Peter P. Paravati, Sr., Esq., Fund Attorney
Sol Tabor, Fund Actuarial Consultant
Harold Silverberg, Fund Accountant
Josephine Dontino, Assistant Administratrix
Teamsters Local Union No. 449
Quad State Leasing

Appendix F
(Emphasis in Original)

[New York State Teamsters Council
Health & Hospital Fund

New York State Teamsters Conference
Pension & Retirement Fund]

January 24, 1984

Mr. Charles Garvaglia
Central Cartage Company, Inc.
34200 Mound Road
Sterling Heights, Michigan 48077

RE: Payroll Examination

Dear Mr. Garvaglia:

The Fund Audit Department has been attempting to arrange a date for an examination of the employer payroll records for Central Cartage Company, Inc., covering the period of July 1981 thru present, with no success.

Telephone calls were made to (313) 939-7000 on the following dates;

December 8, 1983 — 1:30 P.M., Chris took the call and said Mr. Garvaglia would return the call.

December 12, 1983 — 1:45 P.M., informed Mr. Garvaglia was not in but you would return the call.

January 4, 1984 — 10:00 A.M., informed Mr. Garvaglia was not in and no one else can accept the message.

January 9, 1984 — 2:30 P.M., informed Mr. Garvaglia was not in.

If we did not know better, one could get the impression, Mr. Charles Garvaglia was avoiding the scheduling of the required employer payroll examination.

Appendix F

This is the final attempt to obtain your cooperation, should your office fail to communicate in writing, within (14) days of receipt of this letter, a date within the next (30) days for a Fund Payroll Auditor to conduct an examination of the employer payroll records for Central Cartage Company, Inc., your company shall be declared delinquent for what will be termed, an "audit refusal."

The Board of Trustees directs, an employer or company to be audited, must show the auditor or accounting firm conducting such audit, any and all records, books, time sheets, log sheets and other papers or documents deemed necessary by the auditor for a complete and just audit.

Copy of the Employee Retirement Income Security Act (ERISA), Section 1059, Recordkeeping and reporting requirements are enclosed for your information.

Also enclosed, is copy of a decision by the United States Court of Appeals whereby an employer falsified plan-related documents were guilty of a violation of the Federal Criminal Code.

The "Agreement" explicitly states;

"contributions shall be made as set forth herein, on all employees doing bargaining unit work and on any and all other employees doing the same work as bargaining unit employees, whether or not they are included in the bargaining unit, whether or not they are union members, whether full time, part time, casual or seasonal." It can only be determined whether or not Central Cartage Company, Inc. contributed properly on any person performing bargaining unit work, by making available the employer payroll records.

Appendix F

Mr. Charles Garvaglia
January 24, 1984
Page Three

Your company is required to make available to the Fund Payroll Auditor the following:

1). Employer payroll records, pursuant to the Employee Retirement Income Security Act (ERISA), *this includes both bargaining unit and non-bargaining unit employees*. The information to be obtained from the employer payroll records is the names of the employees, hours and/or days paid each week, (examples: year-to-date, monthly or weekly employee earnings records, payroll registers or journals, hourly verification records or time cards).

2). Employer Monthly Pension and Retirement/Health and Hospital Reports.

3). New York State quarterly tax reports - Form WRS-2.

4). Contract(s) and/or Agreement(s) between Employer and participating Local Union(s) for the period July 1981 through the present.

5). Workers Compensation Logs/Reports (yearly O.S.H.A. logs summarizing illnesses and injuries, C-2, C-11, etc. forms) and Company Disability Reports.

In order to facilitate this audit, please have the aforementioned records and information available at the time of the scheduled appointment.

Should these Funds be provoked to cancel participation by Central Cartage Company, Inc., the payment of all claims become the liability of Central Cartage Company, Inc., including but not all inclusive, Health and Hospital Fund Medical Claims, Health and Hospital Fund Death Benefits, Pension and Retirement Fund Pension Benefits, Pension and Retirement Fund Lump Sum Death Benefits, etc..

Appendix F

In addition Central Cartage Company, Inc. shall be required to satisfy the Multiemployer Pension Plan Amendments Act of 1980, the Employer Withdrawal Liability provision.

In the event this office does not hear from your office within the time limit outlined herein, the Funds will act accordingly without any further notice.

Sincerely,

(s) Al Sgaglione
Executive Administrator

AS/maf
Enclosures
C.R.R.R. #P30 2699086
cc: Rocco F. De Perno - Trustee and Chairman
Fund Policy Committee
Ernest Moyer, President, Local Union No. 118
Everett L. Campbell, Secretary-Treasurer, Local Union No. 317
Charles Piscitello, Secretary-Treasurer, Local Union No. 375
Josephine Russo, Assistant Administratrix
Josephine Dontino, Assistant Administratrix
Joseph Marraffa, Director, Data Processing Department
Adele Novak, Senior Supervisor, Bookkeeping Department
Helen Clifford, Supervisor, Audit Department